

TO BE ARGUED BY:  
ARIELLE REID  
(20 MINUTES)

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## COURT OF APPEALS

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STATE OF NEW YORK

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**THE PEOPLE OF THE STATE OF NEW YORK  
EX REL. DOUGLAS RANKIN ON BEHALF OF  
TYRONE WALLER,**

Respondent,

- against -

**CYNTHIA BRANN, COMMISSIONER, NEW  
YORK CITY DEPARTMENT OF CORRECTIONS**

Appellant.

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## **BRIEF FOR RESPONDENT APL 2022-00131**

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COURT OF APPEALS  
STATE OF NEW YORK

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The People of The State Of New York :  
*Ex Rel.* DOUGLAS RANKIN, on Behalf of :  
TYRONE WALLER :

Respondent, :

-against- :

CYNTHIA BRANN, Commissioner, :  
New York City Department of Correction :

Appellant. :

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BRIEF FOR RESPONDENT

PRELIMINARY STATEMENT

By permission of the Honorable Anthony Cannataro, Associate Judge of the Court of Appeals, the Queens County District Attorney’s Office appeals from a January 11, 2022 order of the Appellate Division, Second Department, sustaining Respondent’s petition for a writ of *habeas corpus* to the extent of remitting the matter for an evidentiary hearing pursuant to section 530.60(2)(c) of the Criminal Procedure Law.<sup>1</sup>

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<sup>1</sup> Because Mr. Waller is no longer detained pretrial on the underlying matter, this appeal is moot. *See People ex rel. McManus v. Horn*, 18 N.Y.3d 660 (2012). Appellant urges the application of a mootness exception, and given the importance of the issue, Respondent does not contest its applicability. *See People ex rel. Molinaro v. Warden, Rikers Island*, 39 N.Y.3d 120 (2022).

## STATEMENT OF FACTS

### The First Application: October 1, 2021

On October 1, 2021, Tyrone Waller was arraigned on Queens indictment 1325/2021 (A10).<sup>2</sup> He faced charges of second-degree assault, second-degree menacing, and fourth-degree criminal possession of a weapon based on an alleged altercation with a bodega worker (A76).<sup>3</sup> Following his arrest the previous month, the court had set bail in the amount of \$100,000 cash over \$50,000 bond, along with an order that he comply with electronic monitoring (A44, SA3).<sup>4</sup>

At the time of his arraignment on indictment 1325/31, Mr. Waller had three additional open cases: Queens indictment 1050/2021, along with two unindicted felony matters (A11). Via a note left in the file, the prosecutor assigned to indictment 1050/2021 asked that Mr. Waller's \$10,000 bail on that matter be revoked (A11, A44, A75).<sup>5</sup> The arraigning prosecutor relayed her colleague's summary request, which prompted the court to inquire whether remand on the earlier case was being sought

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<sup>2</sup> Parenthetical references preceded by "A" and "SA" are to the appendix filed by Appellant and the supplemental appendix filed by Respondent, respectively. Citations to Appellant's brief are preceded by "AB." "RC" precedes references to Respondent's compendium.

<sup>3</sup> As of the filing of this brief, Mr. Waller has not been convicted of any crime with respect to this indictment.

<sup>4</sup> Despite utilizing the services of a bail bondsman, Mr. Waller remained incarcerated because of a delay in his electronic monitoring screening (A32).

<sup>5</sup> The case had arisen from a September 2020 car stop, in which an officer driving in an adjacent lane claimed to have "smelled a strong odor of marijuana" emanating from the vehicle (A74). Upon recovering a loaded handgun, the officer arrested Mr. Waller and the vehicle's two other occupants (*id.*). The charges against the other two occupants were eventually dismissed (A75).

“[u]nder [C.P.L. § 530.60] (2)(a) or (2)(b)” (A13).

When the arraigning prosecutor proved unable to answer, counsel volunteered that the same hearing requirements—outlined in C.P.L. § 530.60(2)(c)—were applicable to modifications pursuant to both subsection 2(a) and 2(b) (A13-14). Although counsel believed the appropriate mechanism was 2(a), he noted that the prosecution would be unable to meet their burden under either the 2(a) reasonable cause standard or the 2(b) clear and convincing evidence standard unless they had come prepared with relevant, admissible evidence (*id.*).

Because Mr. Waller was presently being arraigned on indictment 1325/2021, the court questioned whether remand was also being sought on that matter (A15). The prosecutor explained that, while she did not think remand was an option on the new indictment, the fact that Mr. Waller had been “out on a separate violent felony and then commit[ed] an additional felony” rendered him eligible for remand on the earlier case (A16).

Counsel interjected to remind the court that the case had been calendared on three prior dates to allow the prosecution to make its application on indictment 1050/2021 (A16).<sup>6</sup> “At this juncture,” counsel argued, “the government should have known what the statute required and should have been prepared” (*id.*). Their obvious confusion about how to proceed betrayed the fact that they had not undertaken the

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<sup>6</sup> The case was continuously adjourned throughout this period because of the Department of Correction’s failure to produce Mr. Waller for his court appearances (A22).

most basic of their responsibilities: “to have read the statute” prior to seeking revocation of Mr. Waller’s bail (A17).

After a protracted discussion over the admissibility of the felony complaint for purposes of a 2(c) hearing, the arraigning prosecutor conceded that she could not make the application on behalf of her colleague because she did not “have the things that [she was] hearing that [she] need[ed]” (A30). The court agreed to adjourn the case until October 20 to allow the prosecution time to obtain the grand jury minutes on indictment 1325/2021 (A34).

#### The Second Application: October 20, 2021

On the day of the rescheduled revocation hearing, the parties appeared before a new judge—all but Mr. Waller, who had not yet been produced (SA4). As they awaited his production, the prosecutor assigned to indictment 1050/2021 registered her objection to the prior judge’s conclusion that he was entitled to a hearing (*id.*). “[W]hen a qualifying offense has been committed while a defendant is out on another qualifying event, there is no evidentiary hearing,” she argued (*id.*).

As the only person present who had also been in attendance on the previous calendar date, counsel recounted his exchange with the prior judge and prosecutor (SA5). He explained that they had gone through the statute together and arrived at the conclusion that subdivision 2(a) was the applicable provision (*id.*). As a result, the prosecution was required to abide by the hearing processes set forth in subdivision 2(c), introducing either the grand jury minutes or a live witness to establish reasonable

cause (*id.*).

The court expressed skepticism about the prior judge's assessment of the appropriate standard. In its opinion, subdivision one applied "whenever a defendant [was] out on a violent felony and g[ot] rearrested on a violent felony" (SA7). This reading of the statute was adopted by the prosecutor, who agreed "this case falls within 530.60 sub[division] one [] because he's out on a violent felony [and] committed a new violent felony" (SA9). Under subdivision one's less exacting "good cause" standard, she planned to meet her burden by presenting the felony complaint (*id.*).

After briefly pausing the proceedings to speak with the previous judge, the court recalled the case and put the content of their conversation on the record (SA11). According to the court, the previous judge was "embarrassed" by his determination that a 2(c) hearing was necessary (*id.*). Belated though it was, he was now in agreement with his colleague and the prosecution that subdivision one was the applicable provision (*id.*).

Because of the delay in Mr. Waller's production, the court was forced to adjourn the case once more (SA15). Prior to doing so, however, it previewed the decision that awaited the parties on the next date. "When the defendant is out on bail on a violent felony and is brought back before the Court on re-arrest on another violent felony," the court began, "I don't believe any of those sections in subdivision 2 apply" (SA13).

The Final Application: October 29, 2021

Nine days later, with all necessary parties finally present, the prosecutor made her full application for remand on indictment 1050/2021(A45). She began by outlining Mr. Waller's three subsequent arrests. The first, on July 22, 2021, was for an alleged robbery that had taken place on a Queens street two months prior (A46, A76). According to the prosecutor, Mr. Waller had been identified in a photo array on that case and faced 25 years' incarceration (A46).

A few weeks later, on August 2, 2021, Mr. Waller was arrested in Brooklyn after police allegedly recovered a loaded firearm from his car (A47, A77). Lastly, on September 9, 2021, he was arrested on the newest indictment, which involved an alleged bodega assault reported in July (A46). The prosecutor underscored that all of the cases were "extremely strong" (A47).

When asked to pinpoint the statute upon which she was relying, she identified subdivision one of C.P.L. § 530.60 (*id.*).<sup>7</sup> That provision applied, she said, because "while out on a violent felony offense [Mr. Waller] committed another violent felony offense" (*id.*).

Counsel countered by providing a fuller picture of Mr. Waller's history. He had no prior felonies, no history of bench warrants, and had voluntarily surrendered to detectives in the precinct (A48). He was both a full-time carpenter and a full-time,

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<sup>7</sup> The prosecutor initially referenced C.P.L. § 530.12, but acknowledged the error when corrected by the court.

life-long resident of Queens (A49). Owing in large part to this background, he had been recommended for release at arraignment for both indicted Queens cases (A48).

Equities aside, counsel renewed his argument that subdivision (2)(a) was the appropriate mechanism for the prosecution's application (A49). Again, the court rebuffed that interpretation, this time citing a case it believed to be directly relevant: *People v. Garcia*, 67 Misc.3d 511 (Crim. Ct. Bronx Cty. 2021) (A52-53). It adopted the viewpoint articulated by the *Garcia* court, that the Legislature intended subdivision two to apply only to non-qualifying offenses (A53).

Having deemed a hearing unnecessary, the court remanded Mr. Waller based on his "repeated violations of the condition[] of his release, that he not be re-arrested" (A55). Although two of his subsequent cases remained unindicted, the court was satisfied that indictment 1325/2021 provided good cause for revoking his bail on indictment 1050/2021 (*id.*).

#### The Appellate Division Remits for a C.P.L. 530.60(2)(c) Hearing

During the extended arguments on the applicability of subdivision one, the court had suggested counsel take a writ if he objected to its reading of the statute (SA13). On December 13, 2021, counsel accepted that invitation. He filed a writ of habeas corpus in the Appellate Division, Second Department, arguing both that remand was excessive, and that the lower court had not followed the proper procedure in imposing it (A64). Because Mr. Waller had been remanded solely on the basis of his re-arrest for a violent felony, he was entitled to the due process

protections of C.P.L. § 530.60(2)(c) (*id.*).

In their response papers, the prosecution conceded that “[the judge] remanded [Mr. Waller] because he was re-arrested three separate times for violent felony offenses while out on bail” (A78). However, they disagreed with counsel that Mr. Waller was entitled to a hearing prior to that revocation (A86). Endorsing the rationale expressed in *Garcia*, they asserted that C.P.L. § 530.60(2) was not the exclusive mechanism for revoking bail under these circumstances (A86). Instead, courts maintained broad authority to modify bail pursuant to subdivision one “when a defendant is re-arrested on qualifying offenses” (A87).

The Appellate Division’s interpretation was markedly different than the one espoused by the court and prosecutor below. They agreed with counsel that subdivision 2(a)’s “plain, unambiguous language applie[d] to the circumstances of the instant case.” *People ex rel. Rankin v. Brann*, 201 A.D. 3d 675, 677 (2022). In so doing, they declined to read subdivision one as the exclusive province of securing order modifications for qualifying offenses (*id.*).

According to the Appellate Division, such a reading would contravene the clear directives of multiple statutory provisions. Because subdivision 2(a) explicitly referenced people “at liberty as a result of ... bail,” this cohort necessarily included individuals charged with qualifying offenses (*id.*). Additionally, C.P.L. § 510.10(3) identified subdivision two as the mechanism for revocation on the basis of a new felony arrest, providing: “the court shall inform the principal ... that the release is

conditional and that the court may revoke the order of release ... in accordance with subdivision two of section 530.60 of this chapter if the principal commits a subsequent felony while at liberty” (*id.*).

The Appellate Division did not deem it necessary to meaningfully engage with *Garcia*, as its facts implicated provision 2(b) rather than 2(a) (*id.*). However, where the “plain text and legislative purpose of subdivision 2(a) appl[ied],” courts were required to afford the accused the due process mandated by 2(c) (*id.* at 678). To effectuate that mandate in Mr. Waller’s case, the Appellate Division sustained the writ to the extent of remanding for the necessary hearing (*id.*)

#### The Subsequent Proceedings

In accordance with the Appellate Division’s order, the lower court held a C.P.L. § 530.60(2)(c) hearing upon remittal (A107). To meet their burden, the prosecution produced the grand jury minutes for indictment 1325/2021 (A119). Again, they requested remand, and again remand was granted (A107).

The following month, counsel appeared and alerted the court to a change in Mr. Waller’s circumstances (A107). Charges resulting from two of the three subsequent arrests had since been dismissed in Mr. Waller’s favor: the unindicted Queens robbery, as well as the Brooklyn weapon possession (*id.*; A114-115).<sup>8</sup>

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<sup>8</sup> Appellant claims the Brooklyn matter was dismissed pursuant to C.P.L. § 30.30, but the only documentary evidence of the dismissals provided in Appellant’s appendix are the certificates of disposition that were annexed to counsel’s papers. The certificate of disposition in the Brooklyn

Counsel also noted that Mr. Waller had a year of jail time credit on his remaining cases, and the prosecution had offered him two years to cover both outstanding indictments (*id.*). Given these most recent developments, counsel requested that reasonable bail be set (*id.*).

When the court declined to re-issue bail, counsel again filed a writ, arguing that remand was excessive and that the court failed to consider the factors enumerated in C.P.L. § 510.10 upon counsel's application for a modification (A108). In response, the prosecution contended that dismissals of the two intervening cases was irrelevant, as remand had been ordered on the basis of indictment 1325/2021 (A140). In any event, they maintained that remand was appropriate given the likelihood of conviction and the potential sentence Mr. Waller faced (A142). This time, the Appellate Division declined to disturb the lower court's order (A149)

At his subsequent trial on indictment 1050/2021, Mr. Waller was acquitted of third-degree criminal possession of a weapon and resisting arrest, but convicted of second-degree criminal possession of a weapon. He was sentenced on February 28, 2023, and remains incarcerated pending trial on indictment 1325 of 2021.<sup>9</sup>

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matter does not provide the grounds on which the case was dismissed, only that it was dismissed in Mr. Waller's favor.

<sup>9</sup> Respondent was unable to procure a copy of the sentencing minutes prior to the filing of this brief.

## ARGUMENT

AS DETERMINED BY THE APPELLATE DIVISION,  
WHERE THE “PLAIN, UNAMBIGUOUS LANGUAGE”  
OF C.P.L. § 530.60(2)(A) APPLIED TO THE  
PROSECUTION’S APPLICATION TO REVOKE MR.  
WALLER’S BAIL, HE WAS ENTITLED TO THE  
HEARING PRESCRIBED BY C.P.L. § 530.60(2)(C). U.S.  
CONST. AMENDS. VIII, XIV; N.Y. CONST. ART. 1 § 5; C.P.L.  
§ 530.60(2)(A).

At the time the prosecution sought to modify Mr. Waller’s securing order based on a new arrest, C.P.L. § 530.60(2)(a) had been in effect for four decades. Controversy had plagued its enactment, with proponents praising its procedural safeguards and retrospective approach, while opponents decried it as a gateway to outright preventative detention. *See generally People ex rel. Ryan v. Warden*, 113 A.D.2d 116, 117 (1st Dept. 1985); *People v. Bailey*, 118 Misc.2d 860, 866 (Sup. Ct. Bronx Cty. 1983). After much deliberation, the ayes carried and it became law.

Forty years later, as they moved to revoke Mr. Waller’s bail on the basis of his re-arrest, the prosecution betrayed an alarming ignorance of both the longstanding and more recent provisions of the statutory scheme governing securing orders. They concluded first that Mr. Waller’s new charge—a violent felony—was ineligible for remand, and second, that they could appear with nothing more than a felony complaint in hand and request revocation of his bail on a prior matter.<sup>10</sup> As defense

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<sup>10</sup> Felony qualifying offenses are eligible for remand in the first instance. C.P.L. § 510.10(4).

counsel remarked in the wake of this imprudence, “[a]t this juncture[,] the government should have known what the statute required.” *See* A16.

Clearly, they did not. That moment—and every moment since—has highlighted the prosecution’s failure to fully grasp both the law and their arguments relating to it. As a result, the claims bandied about in Appellant’s brief span the gamut from unpersuasive to unpreserved. They must be wholly rejected.

I. The prosecution’s “risk of flight” argument is not properly before this Court.

As it relates to making a coherent, cohesive argument against Mr. Waller’s entitlement to a hearing, the prosecution had four bites at the apple: three in the lower court, and one in the Appellate Division. At every juncture, they confirmed that they were seeking a remand order solely on the basis of Mr. Waller’s subsequent arrests. Indeed, that was the only new circumstance available to them, as Mr. Waller had shown no inclination towards flight even as he acquired new felony cases.<sup>11</sup>

Yet on appeal they impugn the reading comprehension skills of the Appellate Division and urge this Court not to believe its own eyes. *See* AB at 38 (claiming the Appellate Division “misapprehend[ed] the basis of the People’s application and the lower court’s determination”). This posturing is pure artifice. Peel it back, and it reveals itself as nothing more than a desperate ploy to overstep the very clear bounds of this Court’s jurisdiction. *See* C.P.L. § 470.35; *see also* *People v. LaFontaine*, 92 N.Y.2d

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<sup>11</sup> In fact, it was not until he was in the Department of Correction’s custody that returning to court became a perpetual problem. *See* A22.

470, 474 (1998) (Court of Appeals has no authority to address “alternative grounds for affirmance advanced by the People” where those grounds were “not properly raised or considered at the Appellate Division” because they were not “decided adversely to defendant at the trial court.”)

At no point during their many applications did the prosecution make any reference to Mr. Waller’s risk of flight. Although they devote pages of their brief to presenting hypotheticals about various offenses and sentence lengths, none of this theorizing was engaged with below. Instead, they argued before the remanding court that “when a qualifying offense has been committed while a defendant is out on another qualifying event, there is no evidentiary hearing.” SA4. That court adopted this view wholesale, citing *People v. Garcia*, 67 Misc.3d 511 (Crim. Ct. Bronx Cty. 2020), for the proposition that subdivision two of C.P.L. § 530.60 applied only to non-qualifying offenses.

Appellant continued to campaign on *Garcia’s* contrived distinction before the Appellate Division, renewing their argument that people accused of qualifying offenses are not entitled to the same amount of due process as those who stand accused of non-qualifying offenses. Nowhere in their response papers did the phrase “risk of flight” appear. Nevertheless, it is liberally sprinkled throughout Appellant’s brief in the hopes that this Court will ignore its jurisdictional limitations and rescue them from a dilemma of their own creation. Of course it will not. *See People v. Turriago*,

90 N.Y.2d 77, 80 (1997) (“this Court’s jurisdiction is limited,” and “issues that have not been preserved in the trial court are beyond our power of review”).

Appellant’s frenzied reliance on a postmortem risk of flight analysis is misplaced in any event. Were they to have adequately presented this claim below, it would serve them no better than the one they are presently limited to before this Court. Like each of Appellant’s available arguments, this unavailable one relies on an inconceivable reading of the statute and its history.

Appellant acknowledges—in a footnote, so as to not draw too much attention to this fact—that the two factors informing their risk of flight analysis were excised from the statute as part of the 2019 bail reform package. *See* AB at 28, fn. 5; C.P.L. § 510.30(1), L.2019 c.59, pt. JJJ, § 5.<sup>12</sup> Appellant’s nostalgia for the good old days of rampant pre-trial detention on the basis of their initial—and often inaccurate—case assessments cannot turn back time. By removing considerations of the potential sentence and probability of conviction from the statute, the Legislature very clearly indicated its desire that courts *stop* considering them. *See Commonwealth of N. Mariana Islands v. Canadian Imperial Bank of Com.*, 21 N.Y.3d 55, 61-62 (2013) (exclusion of language that had existed in the previous version of the statute “signaled a purposeful

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<sup>12</sup> Prior to the 2019 amendments, courts were empowered to consider, when imposing a securing order, “the weight of the evidence . . . and any other factor indicating probability or improbability of conviction,” as well as “the sentence which may be . . . imposed.” C.P.L. § 510.30(2)(a)(viii), (ix) (repealed Jan. 1, 2020). Although the Legislature has thrice amended the statute since the initial 2019 reforms, neither these factors nor an approximation of them were ever reintegrated into the text.

legislative modification of the applicable scope”); *People v. Iverson*, 37 N.Y.3d 98, 106 (2021); *see also* McKinney’s Cons. Laws of N.Y., Book 1, Statutes § 193 (“The Legislature, by enacting an amendment of a statute changing the language thereof, is deemed to have intended a material change in the law.”).

The Legislature’s excision of these factors was a rational response to a horrific reality. Because the true strength of a case is rarely ascertainable at arraignment, thousands of lives were being disrupted and destabilized based on little more than prosecutorial bravado. *See generally* Assembly Member Dan Quart, New York State Assembly Session, Mar. 14, 2018, at 99 (“Our constituents are doing time in jail for things no jury has weighed in on”); Former Chief Judge Janet DiFiore, *The State of our Judiciary* [2018] (“people lose jobs, homes, and custody of children” when they are incarcerated pre-trial).<sup>13</sup> In removing these factors, the Legislature sought to discourage courts from reflexively and routinely setting bail simply because the prosecution claimed a conviction was a foregone conclusion and prison time would result.<sup>14</sup>

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<sup>13</sup> Webcast and transcript are available at <https://www.nycourts.gov/ctapps/news/soj2018/pdf>.

<sup>14</sup> Notably, state, local, and national statistics indicate that people charged with more serious offenses are more likely to return to court. *See, eg.* Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. Chi. L. Rev. 677, 689-90 (2018) (“Nonappearance rates for those charged with lower-level felonies and misdemeanors are typically higher than for defendants charged with higher-level felonies. In 2009, for example, failure-to-appear rates were lowest for murder (5%) and rape (7%) . . .”); New York City Criminal Justice Agency, *Pretrial Release Without Money: New York City 1987-2018*, March 2019, at 9 (Return rates highest for violent felonies after release on recognizance) *available at* [https://www.nycja.org/assets/CJA\\_RWM\\_March\\_2019.pdf](https://www.nycja.org/assets/CJA_RWM_March_2019.pdf); Vera Institute of Justice, *Against the*

For a convenient illustration, this Court need look no further than the proceedings below. Two of the three “extremely strong” cases the prosecution cited as a basis for modification were resolved in Mr. Waller’s favor. Thereafter, the potential 25-year-sentence presaged in their revocation application manifested in a plea offer of two. Release decisions predicated on this type of legal chicanery routinely resulted in people spending more time in pre-trial detention than they would have been sentenced to otherwise. *See* Senator Velmanette Montgomery, Regular Session, New York State Senate, Mar. 31, 2019, at 2801 (highlighting that many people “spend more time [in jail] because they can’t pay bail than they would have to spend in prison even if they were guilty”).

The injustice of their continued reliance on these excised factors is of no moment to Appellant, who maintains that the mere *fact* of an arrest incentivizes flight, irrespective of the government’s ability to prove the allegations or obtain a maximum sentence. *See* AB at 44, fn. 6. In addition to playing fast and loose with people’s lives, this argument is contrary to both law and common sense. *See People v. Torres*, 112 Misc. 2d 145, 150 (Sup. Ct. N.Y. Cty. 1981) (“A subsequent arrest by itself [], without evidence of the underlying crime, has never *per se* constituted good cause for

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Odds: Experimenting with Alternative Forms of Bail in New York City’s Criminal Courts, Sept. 2017, at 19-20 (“One hundred percent of people [in the cohort] who were either released or made bail on violent felony charges including robbery and assault made all court appearances.”) *available at* [https://www.vera.org/downloads/publications/Against\\_the\\_Odds\\_Bail\\_report\\_FINAL3.pdf](https://www.vera.org/downloads/publications/Against_the_Odds_Bail_report_FINAL3.pdf)

revocation of bail”). An individual has no reason to flee charges the government has demonstrated it cannot indict, to say nothing of prove beyond a reasonable doubt.<sup>15</sup>

Suffice it to say, lack of preservation is not the only fatal flaw in Appellant’s argument on this point. It is not even the most compelling one. But the rules of engagement are what they are, this Court’s jurisdiction is what it is, and the government is no less bound by these restrictions than the individuals they routinely wield them against.

II. The lower court was required to hold a hearing pursuant to C.P.L. § 530.60(2)(a) where the predicate for modifying Mr. Waller’s securing order was his subsequent arrest for a violent felony.

About-face in Appellant’s brief notwithstanding, the prosecution’s argument against the necessity of a hearing in this case has been consistent: the procedural protections outlined in subdivision two of C.P.L. § 530.60 extend only to people charged with “non-qualifying offenses” under New York’s bail statute. That position rests on the premise that courts maintain plenary power to modify the securing order on a qualifying offense—irrespective of the directives of subdivision two—for “good cause” shown.

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<sup>15</sup> As evidenced by their stance here, Appellant possesses an irrationally expansive view of the kind of circumstances that would elevate flight risk. *See* AB at 45 (suggesting that repeated *tardiness* for court, or a subsequent misdemeanor arrest, would provide good cause for revocation of bail under C.P.L. 530.60(1)). These examples are reflective of Appellant’s general approach to—and misunderstanding of—the purpose of bail in New York state.

As the Appellate Division, Second Department correctly concluded below, this interpretation requires a finding that Articles 510 and 530 of the Criminal Procedure Law do not mean what they say. That court rejected the prosecution's invitation to disregard the plain language of the statute, canons of statutory interpretation, legislative history, and common sense. *See People ex rel. Rankin v. Brann*, 201 A.D. 3d 675, 677 (2022). This Court must do the same.

- a. C.P.L. § 510.10 does not grant courts plenary authority to modify an existing securing order post-arraignment.

When the Criminal Procedure Law went into effect in 1971, its statutory structure distinguished between a court's authority to issue a securing order at arraignment and its authority to adversely modify a securing order while a criminal matter was pending. As a matter of historical and contemporaneous fact, these two distinct powers have been situated in C.P.L. § 510.10 and C.P.L. § 530.60, respectively. That basic structure has remained intact for half a century, including in the wake of New York's hallmark 2019 reforms.

By its express terms, C.P.L. § 510.10 is an arraignment statute:

*When a principal, whose future court attendance at a criminal action or proceeding is or may be required, comes under the control of a court, such court shall, in accordance with this title, by a securing order release the principal on the principal's own recognizance, release the principal under non-monetary conditions, or, where authorized, fix bail or commit the principal to the custody of the sheriff.*

C.P.L. § 510.10(1) (emphasis added).

This provision establishes the court’s duty to issue a securing order upon taking control of an individual whose future presence will be required. In the context of a criminal case, that temporal trigger is the initial arraignment.<sup>16</sup> Once the accused is arraigned and the initial securing order is issued by the arraigning court, the duty mandated by C.P.L. § 510.10 is discharged.

As part of the sweeping 2019 legislative effort to ameliorate “the great injustice”<sup>17</sup> of wealth-based detention, the Legislature amended C.P.L. § 510.10 to distinguish between offenses for which bail could be set at arraignment—“qualifying offenses”—and those for which bail could not be set at arraignment—“non-qualifying offenses.” *See* C.P.L. § 510.10(3), (4). During this restructuring of C.P.L. § 510.10, the Legislature did not insert any language into the new provision governing qualifying offenses that could be read as an expansion of its scope to the post-arraignment modification context. Accordingly, “there is nothing in the statute itself indicating any intent other [] than [what] the unequivocal language imports.” *Zaldin v. Concord Hotel*, 48 N.Y.2d 107, 113 (1979).

As has always been the case, then, the securing order imposed pursuant to C.P.L. § 510.10 remains in effect until the conclusion of the criminal action, unless

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<sup>16</sup> Provisions of the Criminal Procedure Law governing proceedings on felony and misdemeanor complaints note the additional applicability of C.P.L. § 530.20 and C.P.L. § 530.40 to criminal and superior court arraignments. *See* C.P.L. §§ 170.10, 180.10.

<sup>17</sup> Senator Michael Gianaris, Regular Session, New York State Senate, Mar. 31, 2019, at 2624.

and until it is modified. Any such modifications are constrained by the statutory mechanism that authorizes them. While the accused may seek a less restrictive securing order via a plethora of statutory vehicles—*see, e.g.* C.P.L. § 510.20 (“Upon any occasion when the court has issued a securing order. . . *the principal may make an application for [release]*”) (emphasis added); C.P.L. § 530.30 (“upon application of the defendant” the court may order release), C.P.L. § 530.20 (same); C.P.L. § 530.40 (same); C.P.L. § 510.40(3) (“at future court appearances, the court *shall consider a lessening of [non-monetary] conditions*”) (emphasis added); C.P.L.R. § 7002 (“*A person illegally imprisoned or otherwise restrained in his liberty... may petition without notice for a writ of habeas corpus*”) (emphasis added)—the Legislature did not bestow such abundance on the government. Instead, the sole province of the court’s authority to increase or revoke bail, either *sua sponte* or upon application of the prosecution, is located within C.P.L. § 530.60.<sup>18</sup>

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<sup>18</sup> Although it does not grant authority to issue a new securing order, C.P.L. § 530.12, which governs the issuance of orders of protection for family offenses, empowers courts, upon a violation of an order of protection, to revoke probationary and conditional discharge sentences, restore cases adjourned in contemplation of dismissal to the calendar, or, on a pending matter, commit the individual to the custody of the sheriff. C.P.L. § 530.12 (11).

C.P.L. § 510.40(3) permits the prosecution to make an application for modification of a securing order based on the accused’s lack of compliance with previously ordered non-monetary conditions. However, the court’s authority is limited to the imposition of additional non-monetary release conditions. It may not order bail. C.P.L. § 510.40(3).

As is the case with C.P.L. § 530.60(2), any action taken pursuant to C.P.L. § 530.12(11) or 510.40(3) must be preceded by an evidentiary hearing.

The framework of C.P.L. § 530.60 is straight forward. It provides three distinct avenues for modification of a securing order at the prosecution’s behest. Subdivision one, the only provision original to this section, authorizes modification for “good cause shown”:

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 issued pursuant to this chapter, and the court considers it necessary to review such order, whether due to a motion by the people or otherwise, the court may ... require the defendant to appear before the court. Upon such appearance, the court, for good cause shown, may revoke the order of recognizance, release under non-monetary conditions, or bail. If the defendant is entitled to recognizance, release under non-monetary conditions, or bail as a matter of right, the court must issue another such order. If the defendant is not, the court may either issue such an order or commit the defendant to the custody of the sheriff in accordance with this section.

C.P.L. § 530.60(1).

As appellant concedes, *see* AB at 26, modifications pursuant to this original provision are predicated on the criterion and principles governing the issuance of the securing order in the first instance: the accused’s risk of flight to avoid prosecution. *See People ex rel. Ryan*, 113 A.D.2d at 117; *People v Saulnier*, 129 Misc. 2d 151, 154-55 (Sup. Ct. N.Y. Cty. 1985) (“the decision whether to revoke bail for “good cause shown” is—like the discretionary decision whether to set bail—subject to the same mandatory goal and criteria set forth in C.P.L. § 510.30, i.e., to ensure a defendant’s presence at trial”). As such, the accused is entitled to the same summary process that occurs at arraignment.

Subdivision two, which was added in 1981 and further expanded in both 1986 and 2019, is more exacting. It contains an enumerated list of triggering circumstances, which themselves are divided into two subparagraphs with corresponding standards of proof. Subdivision 2(a) governs, *inter alia*, the commission of a subsequent violent felony while at liberty on a prior felony:

Whenever .... a defendant charged with the commission of a felony is at liberty as a result of an order of recognizance, release under non-monetary conditions or bail issued pursuant to this article it shall be grounds for revoking such order that the *court finds reasonable cause to believe the defendant committed one or more specified class A or violent felony offenses* or [committed certain victim or witness intimidation offenses] while at liberty.

C.P.L. § 530.60(2)(a) (emphasis added). Conversely, subdivision 2(b) implicates a more eclectic set of circumstances:

Except as provided in paragraph (a) ... whenever ... a defendant charged with the commission of an offense is at liberty as a result of an order of recognizance, release under non-monetary conditions or bail issued pursuant to this article it shall be grounds for revoking such order ... when the court has found, by clear and convincing evidence, that the defendant:

- (i) persistently and willfully failed to appear after notice of scheduled appearances in the case before the court; or
- (ii) violated an order of protection in [certain proscribed manners] while at liberty; or
- (iii) stands charged in such criminal action or proceeding with a misdemeanor or violation and, after being so charged, [committed specified witness intimidation or tampering offenses] while at liberty; or

(iv) stands charged in such action or proceeding with a felony and, after being so charged, committed a felony while at liberty.

C.P.L. § 530.60(2)(b).

Unlike their predecessor, both standard-bearing paragraphs of subdivision two require courts to observe certain procedural safeguards before modifying a securing order on the basis of the enumerated circumstances. Where those conditions are the catalyst for revisiting the securing order, the accused is entitled to an evidentiary hearing, at which the prosecution shoulders the burden of presenting relevant, non-hearsay evidence.<sup>19</sup> See C.P.L. § 530.60(2)(c); *People ex rel. Ryan*, 113 AD2d at 118.

In addition to requiring more process for modifications predicated on felony re-arrests, the Criminal Procedure Law also requires judges to provide the accused with notice that their release will be subject to revocation upon commission of any new felonies. As set forth in C.P.L. § 510.30(3):

When bail or recognizance is ordered, the court shall inform the principal, if he is a defendant charged with the commission of a felony, that the release is conditional and that *the court may revoke the order of release and commit the principal to the custody of the sheriff in accordance with the provisions of subdivision two of section 530.60 of this chapter if he commits a subsequent felony* while at liberty upon such order (emphasis added).

Pursuant to this long-standing statutory framework, the court's power to increase the restrictiveness of a securing order—in other words, to further infringe

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<sup>19</sup> Grand jury minutes are the sole exception to the prohibition against hearsay and may be introduced in lieu of live witness testimony. C.P.L. § 530.60(2)(c).

upon the accused’s liberty—is appreciably constrained. While there is no dispute that the 2019 reforms created a new paradigm for bail-setting in the arraignment context, nothing in the amended text of C.P.L. § 510.10 created a new plenary revocation authority for the months and years that follow.

Thus, if any distinction in the modification procedures for qualifying and non-qualifying offenses existed, the Legislature would have situated it within the ambit of C.P.L. § 530.60. As the Appellate Division correctly determined below, they did not.

b. C.P.L. § 530.60(2)(a)’s unambiguous language applies to modifications based on a violent felony re-arrest.

Appellant’s fundamental dispute is not with the Appellate Division, but rather, with the Legislature and the statute that it crafted. “In implementing a statute, the courts must of necessity ... determine the intention of the Legislature.” *Williams v. Williams*, 23 N.Y.2d 592, 598 (1969); *see also People v. Allen*, 92 N.Y.2d 378, 382–83 (1998) (courts are bound by a “duty to see that the Legislature’s commands are properly carried out”). Because “[t]he statutory text is the clearest indicator of legislative intent,” courts are required to “construe unambiguous language to give effect to its plain meaning.” *Matter of DaimlerChrysler Corp v. Spitzer*, 7 N.Y.3d 653, 660 (2006); *see also People ex rel Molinaro*, 39 N.Y.3d at 124.

In accordance with this obligation, the Appellate Division concluded that “the plain, unambiguous language [of C.P.L. 530.60(2)(a)] applie[d] to the circumstances of this case.” *People ex rel. Rankin*, 201 A.D.3d at 677. Appellant too acknowledges that

inescapable fact. They do not dispute that, by its explicit language, C.P.L. § 530.60(2)(a) governs modifications based on a subsequent violent felony arrest. They do not dispute that C.P.L. § 510.30(3) directs courts to warn individuals being released on felony charges that a subsequent felony re-arrest could subject them to remand pursuant to the procedures outlined in C.P.L. § 530.60(2), *not* C.P.L. § 530.60(1).<sup>20</sup> They do not dispute that Mr. Waller was one such individual, and that his re-arrest prompted their request that his bail be revoked. Under a plain reading of the statutory language, each of these indisputable facts would lead to an equally indisputable conclusion: C.P.L. § 530.60(2)(a) was the only mechanism for modifying Mr. Waller’s securing order on the basis of his new arrest.

This inevitability is at the root of Appellant’s aversion to a plain reading of the statute, and a resulting brief that leads the reader on a winding road to everywhere but its text. Rather than contend with what the statute says, they urge this Court to make logical leaps and improbable inferences in furtherance of things it does not. The origins of this wild goose chase can be traced back to a Bronx County Criminal Court decision in *People v. Garcia*, 67 Misc.3d 511 (N.Y. City Crim. Ct. 2020).

Appellant has adopted the view—articulated for the first time in *Garcia*—that courts are authorized to modify a securing order on *any qualifying offense* pursuant to C.P.L. § 530.60(1), without regard to the specific procedures set forth in C.P.L. §

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<sup>20</sup> Not only do they not dispute it, they fail to even address it, despite the Appellate Division’s reliance on this provision as proof of C.P.L. § 530.60(2)(a)’s applicability.

530.60(2). While this interpretation of the statute suffers from numerous deficiencies, its most fatal is also its most basic: nowhere in C.P.L. § 530.60(2) does the phrase “qualifying offenses” appear. No matter how desperate the tenor of Appellant’s pleas to incarcerate more people on less process become, this “[C]ourt cannot amend a statute by inserting words that are not there.” *Matter of Chemical Specialties Manufacturers v. Jorling*, 85 N.Y.2d 382, 394 (1995) (internal citations omitted).

As an initial matter, when C.P.L. § 530.60(2) and C.P.L. § 510.30(3) were first enacted in 1981, *all* crimes were “qualifying offenses.” Thus, contrary to the prosecution’s insistence, the Legislature did in fact intend to provide heightened due process protections to individuals charged with bail-eligible crimes. That some offenses are no longer eligible for bail in the context of C.P.L. § 510.10 does not bear on the meaning of the text in C.P.L. §§ 510.30(3) and 530.60(2). The Legislature did not add parallel language to either section limiting their applicability to non-qualifying offenses during the 2019 overhaul of the statute, even as it added additional triggering circumstances to C.P.L. § 530.60(2). *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”).

The language of the provisions themselves confirm this universality. Section 510.30 requires the same warning be given to all individuals released on felony charges, whether on their own recognizance or upon posting bail. *See* C.P.L. § 510.30(3) (“when *bail or recognizance* is ordered, the court shall inform the principal...”)

(emphasis added). Similarly, by their explicit terms, C.P.L. §§ 530.60(2)(a) and (b) apply to individuals who've posted bail. *See* C.P.L. § 530.60(2)(a),(b) (“Whenever . . . a defendant . . . is at liberty as a result of . . . bail . . .”). As the Appellate Division highlighted below, bail cannot be ordered—nor can a person be at liberty as a result of bail—on non-qualifying offenses. *People ex rel Rankin*, 201 A.D.3d at 677. Plainly then, these provisions apply to qualifying and non-qualifying offenses alike.

The explicit language of subdivision one bolsters this conclusion. Where the accused is not entitled to a securing order that contemplates release, subdivision one grants the court the discretion to either issue a new order or direct that they be remanded “in accordance with this section.” C.P.L. § 530.60(1).<sup>21</sup> The “section” is C.P.L. § 530.60 in its entirety, not subdivision one; indeed, the standards governing the issuance of a new securing order are found in subdivision two. Thus far from operating in isolation of C.P.L. § 530.60(2), the text of subdivision one points the court to the standards and procedures outlined in it.

Where, as here, a statute contains provisions relating to the same subject matter, “effect and meaning must, if possible, be given to the entire statute and every part and word thereof.” McKinney’s Cons. Laws of N.Y., Book 1, Statutes § 98(a); *see Alweis v. Evans*, 59 N.Y.2d 199, 204 (1987) (provisions must be “read together and applied harmoniously and consistently”). A plain reading of the unequivocal terms of

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<sup>21</sup> This language was added to subdivision one during the amendments of 2019. *See* L.2019, c.59, pt. JJJ, § 20.

the section accomplishes this. Appellant’s alternative interpretation, however, would render C.P.L. § 510.30(3), § 530.60(2)(a), and § 530.60(2)(b) meaningless, internally inconsistent, and nonsensical. For that reason alone, it must be rejected. *See Matter of Mestecky v. City of New York*, 30 N.Y.3d 239, 243 (2017) (“an interpretation that renders words or clauses superfluous should be rejected”) (internal quotation marks and citation omitted)

c. Principles of statutory construction confirm C.P.L. § 530.60(2)(a)’s precedence over C.P.L. § 530.60(1).

Because the text of C.P.L. § 530.60 is clear and unambiguous, the intent of the Legislature can be gleaned without resorting to accepted methods of legal divination. *See generally* McKinney’s Cons Laws of NY, Book 1, Statutes § 92, Comment “(in the construction of statutes ... if language thereof is unambiguous and the words plain and clear, there is no occasion to resort to other means of interpretation”). Nevertheless, for the first time during the two-year life of this case, Appellant dips their toes in the waters of statutory construction. *See* AB at 48. Predictably, it washes every last vestige of their argument away.

As argued by counsel and confirmed by the Appellate Division, the *specific* language of subdivision 2(a) must be applied to the circumstances of this case. So too say the accepted methods of statutory construction. That “a specific statutory provision governs over a more general provision” is a basic principle of law that the prosecution blatantly and repeatedly disregarded below. *See People v. Zephirin*, 14

N.Y.3d 296 (2010); *see also Perl binder Holdings, LLC v. Srinivasan*, 27 N.Y.3d 1, 9 (2016) (“[W]henver there is a general and a specific provision in the same statute, the general applies only where the particular enactment is inapplicable.”).

The belated acknowledgement of this fatal flaw in their interpretation of the statute—while appreciated—ultimately does nothing more than reveal the necessity of their longstanding tactic of avoidance. They claim that the foundational rule mandating primacy of a specific provision over a general one does not apply within the context of C.P.L. § 530.60 because subdivisions one and two are not “incompatible.” AB at 49. This argument is both unpreserved and unpersuasive.<sup>22</sup>

Briefly on the merits: this position is undermined by their very approach to Mr. Waller’s case. Assuming *arguendo* the veracity of their other [unpreserved] argument, *see* Part I, *supra*—that, based on factors excised from the statute, a subsequent violent felony arrest increases flight risk—Mr. Waller could have been remanded under either subdivision one or subdivision two. Under subdivision one, the prosecution need only say he was re-arrested, and off to Rikers he would go. Under subdivision two, the court would hold an evidentiary hearing and the prosecution would have to establish

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<sup>22</sup> Despite advancing this argument for the first time in their Court of Appeals brief, Appellant asserts that Respondent is barred by the rules of preservation from addressing it. *See* AB at 54 (“defendant never raised this argument in the court considering the request for modification, and it is therefore unpreserved for this Court’s review”). It is unclear whether at the root of this absurdity is a lack of understanding of their role in this appeal, a lack of understanding of the preservation doctrine, or both simultaneously. *They* are appealing the Appellate Division’s decision. They cannot, as they seek to do here, raise entirely new arguments on appeal and hide behind the preservation doctrine to avoid challenge.

reasonable cause to believe he committed the crime that served as a basis for his arrest. Same circumstances, same facts, and yet different burdens imposed on the prosecution, and different due process rights afforded to Mr. Waller. This is not “compatibility.” This is arbitrariness.<sup>23</sup>

Appellant’s arguments to the contrary rely on an artificial reading of subdivision 2(a)’s grant of authority. Although it was originally enacted to permit action based on a quasi-public safety analysis, *see* Part II(d), *post*, its text is not self-limiting. The only triggering event required for the initiation of proceedings under subdivision 2(a) is a violent felony re-arrest while at liberty on a pending felony. In that circumstance its applicability is universal, ensnaring people who pose a risk of flight, people who do not pose a risk of flight, and everyone in between. Put another way, a risk of flight assessment is simply not relevant to the initiation of 2(a) modification proceedings.<sup>24</sup>

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<sup>23</sup> Appellant analogizes the competing processes incorporated in C.P.L. § 530.60 to the multiple circumstances that would render a case bail eligible under C.P.L. § 510.10. *See* AB at 50. They offer a scenario in which someone is charged with a qualifying felony while on probation, rendering them eligible for bail on the basis of the offense itself, and separately, their probationary status. *See* AB at 51. This juxtaposition is nonsensical. Regardless of how many ways someone may be eligible for bail under C.P.L. § 510.10, the same summary proceeding governs its imposition at arraignment.

<sup>24</sup> Contrary to Appellant’s assertion, *see* AB at 22, subparagraph 2(a) was also amended by the 2019 legislation. In keeping with the overall legislative intent to reduce the number of people incarcerated pre-trial, the 2019 amendment to subparagraph 2(a) permitted courts for the first time to re-issue bail to individuals re-arrested on violent felonies. *See* C.P.L. 530.60(2)(a), L.2019, c.59, pt. JJJ, § 20. Because release is antithetical to the concept of preventative detention, this amendment represents a retreat from the already modest preventative detention principles that spurred subdivision (2)(a)’s enactment in 1981.

A reading otherwise conjures a statutory scheme in which the prosecution could utter the magic words in every case, render a portion of the statute meaningless, and never have to meet their burden under C.P.L. § 530.60(2)(c) again. However, “if there is to be a diametric change in the statute, it should come from the Legislature”— not the office of the District Attorney. *People v. Case*, 42 N.Y.2d 98, 101 (1977). As will be set forth below, the Legislature was intentional in its crafting of C.P.L. § 530.60(2)(a), knowing full well its meaning. “Courts have no right to add to or take away from that meaning,” and the prosecution has no right to ask them to. *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 (1998).

d. The unequivocal language of C.P.L. § 530.60(2)(a) reflects the Legislature’s multi-decade effort to expand due process safeguards prior to revocation of liberty.

A study of C.P.L. § 530.60’s evolution is not a necessary predicate for rejecting Appellant’s claims. *See Matter. of Auerbach v. Bd. of Educ. of City School Dist. of City of N.Y.*, 86 N.Y.2d 198, 204 (1995) (“Resort to legislative history will be countenanced only where the language is ambiguous or where a literal construction would lead to absurd or unreasonable consequences that are contrary to the purpose of the enactment.”). Still, there is value in the exercise. Much has changed since the statute’s enactment in 1970, both in the text itself and in the Legislature’s attitude towards pretrial detention. The latter has undoubtedly influenced the former.

When C.P.L. § 530.60 was enacted, the constitutionality of pretrial detention for any reason other than to ensure return to court remained unsettled nationwide. *See, e.g., Bell v. Wolfish*, 441 U.S. 520 (1979). As a result, the “good cause” standard articulated in C.P.L. § 530.60(1) necessitated some showing that the accused’s presence had been thrown into doubt. *See People ex rel. LaForce v. Skinner*, 65 Misc.2d 884, 886 (Sup. Ct. Monroe Cty. 1971) (“the same principles that apply to the discretionary denial of bail in the first instance also apply to the discretionary revocation of bail already granted); *Saulnier*, 129 Misc.2d at 154-55.

Then, in the 1980s, the nation began to seriously experiment with the concept of “preventive detention”: pretrial detention as a means of preventing re-arrest. *See, e.g., Schall v. Martin*, 467 U.S. 253 (1984); *United States v. Salerno*, 481 U.S. 739 (1987) (“When the Government proves by clear and convincing evidence [via the “extensive safeguards” present in the federal Bail Reform Act of 1984] that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat.”). New York had considered and rejected this model in the years leading up to the enactment of the Criminal Procedure Law. *See eg., LaForce*, 65 Misc.2d at 887 (noting that the preventative detention language did not carry over from the draft proposed by the State Commission on Revision of the Penal Law and Criminal Code); *People ex rel. Shaw v. Lombard*, 95 Misc.2d 664, 667 (Sup. Ct. Monroe Cty. 1978) (same).

The renewed debate about the propriety of a preventative detention model was no less fraught for New York lawmakers the second time around. Ultimately, after “several years of unsuccessful struggling with various so-called ‘preventive detention’ proposals,” the Legislature ratified a comparatively measured substitute. *Saulnier*, 129 Misc.2d at 154-55 (citing McKinney’s Practice Commentary to § 530.60, McKinney’s Volume 11A at 97).

Rather than adopt a predictive model inviting judges to speculate about the likelihood of a future arrest as other states had done, New York lawmakers settled on a responsive approach. At the urging of the New York County District Attorney’s Office, subdivision two was added to C.P.L. § 530.60, authorizing revocation of bail where the court had reasonable cause to believe the accused committed a Class A or violent felony while released on a pending felony matter. *See* RC- 1, 7 [Letter from Robert Pittler, counsel to Robert Morgenthau, Bill Jacket, L.1981 Ch. 788 ].

At the time, this newly enacted subdivision of C.P.L. § 530.60 was considered a compromise, a delicate balancing of the presumption of innocence with the state’s interest in closing a perceived loophole in the original modification framework. *See id.* at 24 (lauding the statute for “protect[ing] the due process rights of the accused”). It provided clear statutory authority for revoking bail because of a subsequent violent felony arrest, but required an evidentiary hearing prior to revocation so that the court could be “reasonably assured that [the accused] did [what they were subsequently arrested for]” before ordering detention. *Bailey*, 118 Misc.2d at 865 (citing N.Y.

Assembly, Record of Proceedings, Assembly Bill No. 10, 773 p. 1A-11 [1981]).

Furthermore, the Legislature set strict temporal limits on detention ordered pursuant to this new mechanism. *See* 530.60(2)(d)(i).

In 1986, the Legislature augmented C.P.L. 530.60(2)(a) to permit detention where the court possessed reasonable cause to believe a person at liberty on a felony subsequently committed a witness intimidation offense. L.1986 c. 794, § 3. Although some courts had deemed allegations of witness intimidation “good cause” for revocation under subdivision one, this conclusion was not without controversy. *Compare Torres*, 112 Misc. 2d at 153 (alleged threats made to a witness constituted “good cause” for revocation of bail pursuant to subdivision one), *with Saulnier*, 129 Misc. 2d at 155, fn. 9 (alleged threats made to a witness did not constitute “good cause” for revocation of bail pursuant to subdivision one because they did not implicate the accused’s return to court).

The Legislature’s decision to incorporate witness intimidation into subdivision two of the statute was telling. It communicated that allegations of witness intimidation—like a subsequent arrest for a violent or Class A felony offense—were not within the ambit of “good cause,” and thus needed to be based on more than just a say-so. *See People v. Leyva*, 72 Misc.3d 1033, 1035 (Sup. Ct. N.Y. Cty. 2021) (subdivision two’s hearing requirement “demand[s] a more substantive inquiry to ensure that neither side was merely talking through their hat”).

As part of the 2019 overhaul of the bail statutes, the Legislature returned to subdivision two of C.P.L. § 530.60, extending the provision’s due process protections to a variety of additional triggering events. *See* C.P.L. § 530.60(2)(b). In addition to the previously enumerated circumstances, the newly amended subdivision authorized modification of a securing order after an evidentiary hearing where the prosecution proved—by a heightened showing of clear and convincing evidence—that a person at liberty persistently and willfully failed to appear in court ((2)(b)(i)); violated an order of protection in a certain manner ((2)(b)(ii)); committed a witness intimidation or tampering offense while released on a misdemeanor or violation ((2)(b)(iii)); or committed a second felony while released on a prior felony ((2)(b)(iv)). As noted in Part II(b), *supra*, the Legislature also added language to subdivision one directing courts to act “in accordance with” section § 530.60 broadly.

There is only one rational conclusion to be drawn from this history, and it is not the one Appellant advances. If the Legislature had adopted Appellant’s view that a subsequent violent felony arrest necessarily increased the accused’s incentive to flee, there would have been no need for a subdivision 2(a). Instead, courts could have remanded every individual who came before them with a new violent felony arrest on that basis alone. *See McKinney’s Cons. Laws of N.Y., Book 1, Statutes § 193* (“The Legislature, by enacting an amendment of a statute changing the language thereof, is deemed to have intended a material change in the law.”).

Although some courts utilized subdivision one as a punishment for re-arrests, the scope envisioned by the Legislature was clearly not so broad.<sup>25</sup> It must be presumed that the addition of a new statutory provision addressing these circumstances was rational and responsive to a perceived inadequacy in the law. *See Farrington v. Pinckney*, 1 N.Y.2d 74, 88 (1956) (legislature is “presumed to have investigated the subject” of its statutory amendments “and to have acted with reason, not from caprice”).

Moreover, in enacting subdivision 2(a), and in every amendment to C.P.L. § 530.60 since, the Legislature has reaffirmed its commitment to expanding due process protections for individuals facing revocation of their liberty. *See generally People v. Litto*, 8 N.Y.3d 692, 697 (2007) (courts must examine the purpose of the overall statutory scheme, particularly where “the Legislature itself, over the course of the century, has repeatedly refined the statute as society has evolved”). Their message is clear. Having

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<sup>25</sup> At the time subdivision 2(a) was added to C.P.L. § 530.60, it was well known that some judges were flouting New York’s long-standing prohibition on preventative detention. *See* RC-8 [Letter from Senator Charles Cook, Bill Jacket, L.1981 Ch. 788 ] ( “some judges [] have accomplished de facto preventative detention by virtue of setting high bail”); *Bailey*, 118 Misc.2d at 865 (“although the practice of preventative detention is prohibited it is commonly practiced under our present system under the guise of high bail”).

Lower courts’ resentment of the Legislature’s approach to pretrial detention is hardly a novel phenomenon. *See generally People ex rel. Benton by Weintraub v. Warden: New York City House of Det. for Men, E. Elmhurst, New York 11370*, 118 A.D.2d 443, 445 (1st Dept. 1986) (securing order imposed by the lower court “reflect[ed] a larger disregard of the ultimate purpose of bail”); *People ex rel. Shaw*, 95 Misc.2d at 668 (“The problem which the local criminal court feels justifiably obligated to control pre-trial is unfortunately beyond its jurisdiction and should be addressed by the Legislature”). Thus, Appellant’s reliance on decades-old lower court decisions that flout the will of lawmakers should not persuade this Court to follow suit. *See, eg.* AB at 27-28.

allowed someone to remain at liberty pending trial, revoking that liberty on the basis of one of the enumerated subdivision two factors requires more than prosecutorial posturing.<sup>26</sup> *See generally People ex rel. Lobell v. McDonnell*, 296 N.Y. 109, 111 (1947) (As a policy matter, New York law favors pre-trial liberty “because of the presumption that the prisoner is innocent.”); *People ex rel. Wayburn v. Schupf*, 29 N.Y.2d 682, 686-87 (1976) (“any pretrial detention impinges on the right to liberty, a fundamental right that is recognized in the constitutional sense as carrying a preferred status and so is entitled to special protection”).

The Legislature understood all too well the fickle nature of prosecutorial assurances. Neither Appellant nor this Court need be reminded that one of the catalysts for the 2019 reforms was the government’s unconscionable treatment of Kalief Browder. Assembly Speaker Carl Heastie, *SFY 19-20 Budget Includes Critical Criminal Justice Reform Legislation and Funding*, Apr. 1, 2019 (“The legislation was inspired in part by the tragic case of Kalief Browder[.]”).<sup>27</sup> Mr. Browder spent *years* in pretrial detention on a violent felony offense before the prosecution finally admitted

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<sup>26</sup> Contrary to Appellant’s claim, courts are also required to hold an evidentiary hearing prior to modification on the basis of a violated non-monetary condition. *Compare* C.P.L. 510.40(3), *with* AB at 46 (“under the Appellate Division’s ruling, if a defendant violates a condition of release, such as failing to attend a court-mandated program, a court could modify the defendant’s securing order without a hearing under a risk-of-flight analysis, even if the defendant’s commission of that violation is disputed”).

<sup>27</sup> Available at <https://nyassembly.gov/Press/files/20190401a.php> (last accessed May 29, 2023).

they could not prove their case. *See* Jennifer Gonnerman, *Before The Law*, *The New Yorker*, September 29, 2014.<sup>28</sup>

Indeed, the same concern that led to the excision of the probability of conviction and length of sentence factors also animates the Legislature’s insistence on an evidentiary hearing prior to revocation of bail pursuant to C.P.L. § 530.60(2). Prosecutorial assessments at the start of a case continue to be an unreliable metric. For instance, in 2021, 46.9% of felony arrests across New York State ended in either a decision not to prosecute, a dismissal, or an acquittal; of those that did not, only 13.1% resulted in a felony conviction. *See* New York State Division of Criminal Justice Services, *Dispositions of Adult Arrests (18 and older) 2017-2021*.<sup>29</sup> In New York City, the percentage of dismissals and acquittals was even higher: 66.5%. *Id.*

A system that stakes a person’s fundamental right to liberty on these odds is precisely the kind of system New York lawmakers sought to move away from when they overhauled the statute in 2019. On this point, the Court need look no further than the floor speech by the bill’s sponsor: “We like to talk about we’re all innocent until proven guilty, but that’s not the way the system works. The way the system works is you’re guilty unless you have enough money to pay your way out. And that is

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<sup>28</sup> Available at <https://www.newyorker.com/magazine/2014/10/06/before-the-law> (last accessed May 20, 2023).

<sup>29</sup> Available at <https://www.criminaljustice.ny.gov/crimnet/ojsa/dispos/index.htm>.

what we're trying to change here today.” Senator Michael Gianaris, Regular Session, New York State Senate, Mar. 31, 2019, at 2631.

...

Four decades ago, District Attorneys proposed and lobbied for the enactment of C.P.L. § 530.60(2)(a). They highlighted its due process protections, hailing it as a compromise to a Legislature that had always been skeptical of a paradigm that punished people for crimes that had not yet been proven. They got what they wanted: a statutory provision permitting pretrial detention based on alleged subsequent criminal activity.

Now, they seek a run-around to the procedural safeguards imposed to protect the accused's presumption of innocence. It is obscene. “In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” *Salerno*, 481 U.S. at 755. Criminal Procedure Law § 530.60(2)(a) is the carefully limited exception applicable to the circumstances presented here. Thus, if “reasonable cause” is too high a burden to meet before revoking bail on the basis of a new violent felony arrest, the prosecution should reevaluate its case rather than undermine the fundamental rights of the accused and subvert the clear intent of the Legislature.

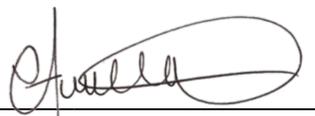
Let it not be forgotten: the “People of the State of New York” elected the officials who enacted C.P.L. 530.60(2)(a), and who expanded due process protections for individuals accused of crimes in every amendment since. It is the will of *those* people that must be done.

CONCLUSION

FOR THE REASONS STATED IN POINT I, THE ORDER OF  
THE APPELLATE DIVISION SHOULD BE AFFIRMED.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'Arielle Reid', is written over a horizontal line.

ARIELLE REID

*Of Counsel*

May 30, 2023

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 500.13(c)(1) of the Court of Appeals Rules of Practice, I certify that the word count for this brief is 10, 277, excluding the Table of Contents and Table of Authorities. The word processing system used to prepare this brief and to calculate the word count was Microsoft Word. The brief is printed in Garamond, a serified, proportionally spaced typeface. The type size is 14 points in the text and headings, and 12 points in the footnotes.