

To Be Argued By:
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New York Supreme Court
APPELLATE DIVISION—SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

DOCKET NO.
2020-02485

—against—

NICOLE ADDIMANDO,

Defendant-Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION SECOND DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK, :
 :
 Respondent, : A.D. No.:
 : 2020/02485
 -against- :
 :
 NICOLE ADDIMANDO, : Ind. No. 74/2018
 :
 Defendant-Appellant. :
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INTRODUCTION

Respondent’s brief is no more faithful to the evidence and the law than its severely flawed prosecution of Addimando. While claiming that this Court should adopt factual inferences Respondent draws from its skewed depiction of the record, Respondent fails to refute that Addimando’s conviction was marred by the denial of multiple constitutional and statutory rights. In sum, and as shown in detail below, Respondent: (i) downplays the prejudice to Addimando from being deprived of her counsel through erroneous applications of settled law and multiple ethical rules; (ii) seeks to excuse as inconsequential the District Attorney (the “DA”) undermining the integrity of the grand jury by repeatedly eliciting a detective’s false and damaging testimony that Addimando used baby wipes to remove her fingerprints from the gun used to shoot Grover; (iii) defends the denial of Addimando’s “substantial right” to exercise a peremptory challenge absent proof

that granting the challenge would cause any “discernable interference or undue delay” in the jury selection process; (iv) justifies the exclusion of evidence demonstrating Grover’s abuse of Addimando, which directly rebutted the DA’s core argument for conviction, by proffering an erroneous admissibility standard; and (v) endorses the trial court’s misapplication of the Domestic Violence Survivors Justice Act (“DVSJA”) by claiming that the opinion was “lengthy” and “eminently reasonable” (Resp. Br. at 4), while ignoring the trial court’s failure to apply the statutory language or intent.

While ignoring settled law, the focus of Respondent’s brief—through mischaracterizations of the record and reliance on long-rejected stereotypes of survivors of domestic violence—is to discredit the abundant evidence that Grover horrifically abused Addimando (including photographs, medical reports, and eyewitness accounts) and claim that Addimando did not act out of fear for her life. While these efforts are not relevant to the constitutional and statutory violations requiring reversal of Addimando’s conviction, Respondent’s portrayal of Addimando as someone who was not physically and psychologically victimized by Grover, and who plotted his murder and then shot him while he slept, cannot be left unanswered. Thus, Addimando briefly addresses Respondent’s distortions and half-truths on these issues in Section V, *infra*.

What *is* relevant to Addimando's request for appellate relief is that beginning with the disqualification of her counsel after eight months of active representation, continuing through the grand jury proceedings, jury selection, and trial, and ending with the trial court's flawed sentencing decision, Addimando's conviction and sentencing were secured through a chain of fundamental legal errors that all but assured a wrongful conviction. As set forth below and in her opening brief, these errors require dismissal of the indictment and reversal of her conviction or, if the conviction stands, resentencing under the DVSJA.

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY DENIED ADDIMANDO HER RIGHT TO COUNSEL.

Respondent defends depriving Addimando of counsel of her choice because (i) as an indigent defendant, she purportedly had no right to retain her counsel, and (ii) a potential witness, Cesar Betancourt, incorrectly described as both a former and current client of the Dutchess County Public Defender ("DCPD"), created an unwaivable conflict for Addimando's counsel. (Resp. Br. at 40, 43.) As shown both by Addimando and *amicus curiae* the New York City Bar Association

(“NYCBA”), Respondent’s arguments are unsupported by the factual record and rely on misstating controlling law and ethical rules.¹

A. Addimando Had a Constitutional Right to Be Represented by Her Assigned Counsel.

Respondent is simply wrong that Addimando had no right to retain her assigned counsel. (Resp. Br. at 40-41.) The law is clear that “once an attorney-client relationship has been formed between *assigned* counsel and an indigent defendant, the defendant enjoys a right to continue to be represented by that attorney as counsel of his own choosing.” *People v. Griffin*, 92 A.D.3d 1, 5 (1st Dep’t 2011), *aff’d*, 20 N.Y.3d 626 (2013) (emphasis added). In arguing to the contrary, Respondent misreads *People v. Espinal*, which actually confirms that disqualification deprived Addimando of her fundamental right. *See* 10 A.D.3d 326, 329 (1st Dep’t 2004) (reversing conviction based upon the improper removal of assigned counsel).

In addition to misstating black-letter law, Respondent relies on the factually incorrect and legally irrelevant assertion that disqualification was harmless because Addimando “had intended to only use the public defender’s office through the grand jury presentation and then planned to retain private counsel.” (Resp. Br.

¹ The NYCBA concluded both that “the disqualification [of Addimando’s counsel] was not based on a proper interpretation of the New York Rules of Professional Conduct” (NYCBA Br. at 15) and that “the County Court misapplied” those Rules. (*Id.* at 3.)

at 41 n.16.) Respondent bases this factual misrepresentation on (i) testimony that Addimando's close friend "met with [private] attorneys" *shortly after the arrest* on Addimando's behalf, and (ii) the DA's *own assertion* that "[e]arly on the defendant . . . had discussed using the Public Defender's Office up and through Grand Jury presentation." (Resp. Br. at 41.)² Neither point remotely establishes that Addimando intended to remove DCPD as trial counsel at the time of the DA's disqualification motion, nor rebuts the uncontested evidence that Addimando strenuously opposed removal of her counsel.

More fundamentally, whether the trial court's error was "harmless" has no bearing on the denial of her constitutional right to counsel at the time she sought to exercise it. "The doctrine of harmless error is inapplicable to a violation of a defendant's right to counsel of his own choosing." *Espinal*, 10 A.D.3d at 330 (citing *People v. Arroyave*, 49 N.Y.2d 264, 273 (1980)).³

² Notably, Respondent raises this argument here although the trial court correctly pointed out that the contention was not relevant to the "facts and the ethical rules." (DT. 11.)

³ Moreover, Addimando *was* greatly prejudiced. For example, although requiring a "minimum of a month" to get up to speed on the case (*see* HT. 34), replacement counsel was given only two weeks to absorb eight months of work by his predecessor before the grand jury convened. DCPD had planned for Addimando to testify before the grand jury, but she did not do so when DCPD was replaced. In addition, Addimando wanted to retain her DCPD attorney in part because she "did not feel comfortable going through this again with another attorney and explaining all of the various heinous things that ha[d] happened to her in the past[.]" (DT. 6.)

B. Under Applicable Precedent and the Ethical Rules, DCPD's Prior Representation of Betancourt Did Not Create a Conflict Because There Was No "Substantial Relationship" to the Addimando Representation.

The DA sought to disqualify Addimando's DCPD counsel, Kara Gerry, because Addimando identified Cesar Betancourt as someone who had abused her in the past. Seven years prior to its representation of Addimando and before Gerry joined DCPD, another DCPD lawyer represented Betancourt on a wholly unrelated DWI charge. The prior representation did not subject Gerry or DCPD to "conflicting ethical demands" (Resp. Br. at 42), and provided no basis to deprive Addimando of her counsel.

It is well established that with respect to former clients such as Betancourt, only representations that are "substantially related" to the former representation give rise to an actual or potential conflict.⁴ See Rules of Professional Conduct (22 NYCRR 1200.0) Rule 1.9; *Solow v. W.R. Grace & Co.*, 83 N.Y.2d 303, 308 (1994); (NYCBA Br. at 7). Indeed, both this Court and the Court of Appeals

⁴ As the NYCBA explained, Respondent, like the trial court, ignores the critical distinction between the duties owed to current clients (under Rule 1.7) and those owed to former clients (under Rule 1.9). For former clients, a lawyer's ethical obligation turns on the substantial relationship test: "lawyers are only required to refrain from representing a new client in a matter where it is 'substantially related' to a matter which the lawyer previously handled for a former client." (NYCBA Br. at 7.) "This difference between the duties owed to current and former clients is critical and strikes a delicate balance between the lawyer's obligations of loyalty and confidentiality to the former client, on one hand, and the policy goals of not needlessly restricting a future client's ability to benefit from the lawyer's services, on the other." (*Id.* at 8-9.) Respondent elected not to address the NYCBA brief.

have applied the “substantial relationship” test in matters concerning disqualification based upon purported conflicts. *See, e.g., Matter of Hannah T.R.*, 156 A.D.3d 887, 888 (2d Dep’t 2017) (citing *Solow* and Rule 1.9); *People v. Perez*, 70 N.Y.2d 773, 774 (1987) (holding no “actual conflict was demonstrated” where public defender cross-examined former client of public defender’s office).

Conceding the obvious—the Betancourt DWI and the Addimando murder representations were not substantially related (Resp. Br. at 51)—Respondent erroneously argues that the “substantial relationship” test is not controlling by misreading the precedent it cites. (Resp. Br. 51-52.) For example, Respondent claims that *People v. Prescott* did not apply the substantial relationship test but found a conflict because of “mutually incompatible legal strategies.” (*See* Resp. Br. at 51-52 (quoting *People v. Prescott*, 21 N.Y.3d 925, 928 (2013)).) However, *Prescott* held that a conflict existed precisely because the representations at issue “concerned *substantially related matters.*” *Prescott*, 21 N.Y.3d at 928 (emphasis added).

The other cases cited by Respondent are similarly misconstrued. Both *People v. Watson* and *People v. Carncross* apply the very principle that Respondent claims is “unavailing” in analyzing the purported conflict here. (Resp. Br. at 51 n.20); *see People v. Watson*, 26 N.Y.3d 620, 623, 625 (2016) (citing Rule 1.9 in holding that successive representations relating to the same incident created a conflict); *People v. Carncross*, 14 N.Y.3d 319, 327-30 (2010) (applying similar

principle concerning successive representations arising out of same incident). And *People v. Solomon*, another case that Respondent misreads, involved a lawyer's *simultaneous* representation of a defendant and a prosecution witness in separate matters. 20 N.Y.3d 91, 94 (2012). In short, Respondent argues that the "substantial relationship" test should not be applied by relying on cases that apply that very standard.

Moreover, Respondent's assertion that DCPD was conflicted because of a prior unrelated representation that ended years earlier is unworkable in addition to being incorrect. Under the theory adopted by the trial court, a lawyer would have to drop a current client any time the engagement potentially involved a witness that the lawyer had represented years in the past even on an entirely unrelated matter. (*See* Opening Br. at 35-36.)

At a minimum, adopting the trial court's ruling would cripple public defenders, whose former clients are often third-party witnesses in unrelated criminal cases. (*See id.*); *State v. Bell*, 90 N.J. 163, 168-69 (1982) (application of strict disqualification standard for public defense organizations would "needlessly deprive many defendants of competent local public defenders"). And, as the NYCBA demonstrates, the trial court ruling would cause clients to "suffer from denial of the counsel of their choice." (NYCBA Br. at 9.)

C. Betancourt Was Not a Current Client of DCPD and Thus Was Not Owed Any Duties that Would Create a Conflict.

Perhaps recognizing that disqualification was improper under the applicable substantial relationship test, Respondent argues, for the first time on appeal, that Betancourt was a “current” client of DCPD.⁵ (*See* Resp. Br. at 46-47.)

This newly advanced claim is belied by the uncontested fact that Betancourt was not a contemporaneous client of DCPD. DCPD responded to an inquiry from Betancourt by: (i) advising him that DCPD could *not* represent him because of the representation of Addimando; (ii) informing him that DCPD could attempt to have him assigned another attorney; and (iii) pending appointment of counsel, a DCPD investigator (not an attorney) noted that Betancourt was not obliged to sit for an interview with the DA. When DCPD notified the DA that Betancourt had decided that he did not wish to speak with the DA (*see* Affirmation in Opposition at 3), DCPD again explained that DCPD did *not* represent Betancourt. (Resp. Br. at 46-47.)

In light of DCPD’s express disclaimers of any representation of Betancourt, Betancourt was not a current client to whom DCPD owed any duty.

⁵ Because the DA did not raise before the trial court the argument that Betancourt was a current client of DCPD (*see* Notice of Motion to Recuse at 14-15 (discussing Betancourt as a “former client”); DQO at 2 (referring to Betancourt as a “former client”)), Respondent is precluded from doing so now. *See People v. Dotz*, 61 N.Y.2d 408, 416 (1984); *People v. Geddes-Kelly*, 163 A.D.3d 716, 717 (2d Dep’t 2018) (rejecting prosecution’s attempt to raise new argument on appeal).

Indeed, throughout the very interactions that Respondent claims created an attorney-client relationship, DCPD immediately, repeatedly, and unambiguously stated that it was not Betancourt's lawyer. (*See* Letter from Nancy Garo to Krauss (April 24, 2018) (identifying Betancourt as a "former client" and noting a request that "an 18B attorney . . . be assigned for him"); Affirmation in Opposition at 2-3 ("When Betancourt called [DCPD]," he was told: "You have a right to an attorney. Our office has a conflict. If you can't afford an attorney, we can contact the court to have one appointed on your behalf"); DQO at 2 (noting DCPD "advised [Betancourt] to get another attorney" when he reached out to them and requested that one be appointed on his behalf).) Respondent never raised this argument below because on this record, neither Betancourt nor anyone else could reasonably conclude that he was a current client of DCPD.

Where, as here, the attorney specifically denies the existence of an attorney-client relationship, no such relationship is formed. *See Seaman v. Schulte Roth & Zabel LLP*, 176 A.D.3d 538, 539 (1st Dep't 2019) (no attorney-client relationship where attorney "clearly disclaim[ed]" relationship and advised the individual to consult other counsel); *see also Moran v. Hurst*, 32 A.D.3d 909, 911 (2d Dep't 2006) (finding no attorney-client relationship where lawyer never

“affirmatively led [the alleged client] to believe that they were acting as his attorney or knowingly allowed him to proceed under that misconception”).⁶

D. Any Conflict Should Not Be Imputed to Addimando’s Individual Counsel.

Assuming contrary to law that *DCPD* had a conflict, the conflict would not justify disqualification of *Gerry*, the lawyer representing Addimando. Because *Gerry* did not previously *represent* Betancourt—and indeed was not aware of any facts regarding that representation, and did not even work at DCPD as the time of Betancourt’s years-old representation—a conflict for DCPD would not be imputed to *Gerry*. (See Opening Br. at 33-36 (citing, *inter alia*, *People v. Wilkins*, 28 N.Y.2d 53, 56 (1971) (refusing to impute knowledge of one public defender to all other public defenders in office)).)

Respondent asserts that the rule against imputation of conflicts within legal services organizations does not apply where current counsel is aware of the

⁶ Moreover, although DCPD did not provide Betancourt with any *legal advice*—it was an investigator rather than an attorney who spoke with Betancourt (Affirmation in Opposition at 2)—even an attorney counseling Betancourt about his right to remain silent would not have created an attorney-client relationship. See *People v. Modeste*, 159 Misc. 2d 250, 259-60 (Sup. Ct. Queens Cnty. 1993) (attorney providing legal advice without authority does not create attorney-client relationship). Although Respondent cites *People v. Mitchell* for the purported proposition that a third party cannot invoke the right to counsel on behalf another individual (see Resp. Br. at 47 (citing 2 N.Y.3d 272, 275 (2004)), *Mitchell* does not suggest that reporting that Betancourt decided not to be interviewed (while affirming he was not a client) created an attorney-client relationship. Rather, *Mitchell* addressed whether a juvenile defendant’s right to counsel had attached because the defendant’s mother informed law enforcement that defendant was represented by counsel. 2 N.Y.3d at 274-75.

prior representation (Resp. Br. at 52-53 (citing *Watson*, 26 N.Y.3d at 626)). But *Watson* says no such thing. There, the Court of Appeals held that a conflict could be imputed where a prior representation “arose from the same incident that led to [the current client’s] arrest.” *Watson*, 26 N.Y.3d at 626. *Watson* expressly refused to “disturb the general rule against imputation of knowledge created” by the Court of Appeals in *Wilkins*. *Id.*

E. There is No Support for the Claim that Gerry Did Not and Could Not Zealously Defend Addimando.

Respondent also argues that disqualification was appropriate merely because identifying Betancourt as a person who had abused Addimando in the past put DCPD in “an untenable position” that prevented DCPD from fulfilling its duty of loyalty to Addimando, potentially giving rise to an ineffective assistance of counsel claim. (Resp. Br. at 45-49.) According to Respondent, “the result of Betancourt’s [DWI charge], and his underlying conduct, would have been proper (and potentially valuable) impeachment material, but DCPD would not have ethically been permitted to cross examine him about it.” (Resp. Br. at 46.)

Putting aside what is, at best, the questionable premise that Betancourt’s DWI could or would be used to cross-examine a witness about sexual abuse, Respondent’s argument is pure speculation: there is no evidence DCPD possessed any non-public information about Betancourt. Rank speculation that DCPD had non-public information about Betancourt—or what that information

might be—is insufficient to deprive Addimando of her counsel. *See People v. Pagan*, 57 Misc.3d 486, 493 (N.Y. Crim. Ct. Bronx Cnty. 2017) (concluding conflict did not exist where prosecution’s claim that defense counsel would be restricted in cross-examination was “wholly speculative and meritless”).⁷

Respondent’s additional assertions that DCPD violated its obligations to zealously represent Addimando are no more premised in fact or law. Because the defense did not deem Betancourt to be an essential witness (it was the DA who made this assertion), conveying Addimando’s offer to not call Betancourt in order to retain her counsel was not an act of disloyalty by DCPD. (*See* Resp. Br. at 44.) Betancourt was not called to testify at trial by either side, a point Respondent admits only in a footnote without explanation of why the DA failed to call a witness it deemed “crucial” when seeking disqualification. (Resp. Br. at 47 n.18.)

There also was no failure of loyalty to Addimando when DCPD informed the DA that Betancourt would not voluntarily submit to an interview. (Resp. Br. at 48.) DCPD’s notice to the DA reciting what Betancourt told DCPD was a ministerial act that did not disadvantage Addimando in any way. Conveying Betancourt’s decision to decline an interview did not change the role of Betancourt,

⁷ Moreover, *if* DCPD had such information, that still would not create a conflict warranting disqualification. Under Rule 1.7, a lawyer is prohibited from using a former client’s confidences, but there is no suggestion under separate Rule 1.9 that mere possession of confidences precludes a subsequent representation that is not substantially related. *Compare* Rules of Professional Conduct (22 NYCRR 1200.0) Rule 1.7 *with id.* at Rule 1.9.

for whom DCPD promptly sought alternate counsel because of its ongoing representation of Addimando. Addimando and the DA remained free, if they desired, to call Betancourt as a witness.

Finally, Respondent's suggestion that DCPD acted "shockingly" by offering to omit references to Betancourt at trial to alleviate any imagined conflict evidences dedication to Addimando, not disloyalty. (Resp. Br. at 49.) Facing the DA's effort to deprive her of counsel who had guided her for eight months, Addimando, through DCPD, offered to moot any possible conflict by making a straightforward strategic decision not to rely on an objectively collateral witness. Respondent's defense of the DA's attempt to engineer an inability on the part of Gerry to strenuously defend Addimando, premised on its hollow claim that Betancourt was a "crucial witness," falls flat.⁸

F. Addimando Knowingly Waived Any Putative Conflict.

Independent of whether a conflict existed, it was error to disqualify Addimando's counsel after Addimando knowingly waived any conflict following consultation with independent counsel the trial court characterized as "very experienced." (Opening Br. at 37-38, n.12.) Addimando's waiver was supported by multiple representations both by Addimando and independent counsel about his

⁸ Respondent's contention that DCPD's actions could have given rise to an ineffective assistance of counsel claim (Resp. Br. at 49) lacks merit for the multiple reasons Addimando explained in her opening brief, to which Respondent declined to respond. (*See* Opening Br. at 39.)

advice to Addimando and her decision in response. (*Id.*) Notwithstanding this clear colloquy, Respondent erroneously claims “this record is plainly insufficient to conclude that Appellant’s waiver was knowing and voluntary.” (Resp. Br. at 53.)⁹

A defendant may waive a possible conflict where she has “an awareness of the potential risks involved in that course and . . . knowingly ch[oo]ses it.” *People v. Macerola*, 47 N.Y.2d 257, 263 (1979). That standard was met here. (Opening Br. at 16.) The trial court first informed Addimando that the purpose of appointing independent counsel was to give her “an independent person to talk to that only has your interests in mind regarding this particular issue.” (DT. 4.) The court then characterized the purported conflict as described by the DA: namely that “a potential witness, which has not been determined, is Cesar Betancourt,” and that he had previously been “represented by Nancy Gary [sic], who is a Public Defender, and also works with Ms. Gerry presently.” (DT. 4-5.)

After consulting with Addimando, conflicts counsel later represented to the court that he had discussed with Addimando “concerns” regarding the putative conflict, including “potential issues that may arise during trial [and] potential issues that may arise during appeals” (DT. 5-6), as well as “issues of cross-examination

⁹ Although Respondent asserts that the purported conflict was “unwaivable” (Resp. Br. at 41), Respondent provides no analysis. The category of conflicts that a client may not waive is limited, and does not encompass that raised here. (*See* Opening Br. at 37- 38.)

with regard to [Betancourt] and some of the limitations that [Gerry] might have with regard to that matter.” (DT. 7.) The trial court asked conflicts counsel if he was “very comfortable that Ms. Addimando understands what the issue is, what the possible ramifications are, both positive and negative, and understood all of the issues that revolve around that particular issue.” (DT. 8.) Conflicts counsel responded in the affirmative without qualification. The trial court then confirmed with Addimando that she understood the supposed conflict and “had all the time and information [she] need[ed] to make a decision.” (*Id.*)

On these facts, Respondent’s representation to this Court that the record is “insufficient” to support a knowing waiver is simply false. Indeed, it is hard to imagine what more could have been done to establish a knowing waiver and, tellingly, Respondent offers no suggestions of what it contends is missing. The lack of merit to Respondent’s argument is confirmed by its failure to lodge any contemporaneous objection to the trial court’s colloquy or Addimando’s affirmative waiver. Given that the “court’s role” in adjudicating conflict waivers is not to second-guess the client, but “simply to insure through adequate warnings that the defendant’s decision has been made with awareness of h[er] rights and the potential risks,” the trial court erred in rejecting Addimando’s informed waiver. *People v. Salcedo*, 68 N.Y.2d 130, 135 (1986). The record here is more than legally sufficient to establish Addimando’s knowing waiver, which should have been honored.

Contrast People v. Cortez, 22 N.Y.3d 1061, 1066 (2014) (conflict inquiry inadequate because court did not appoint independent conflicts counsel to advise defendant, indicate to defendant why conflict could exist, or even inform defendant of right to conflict-free representation).

II. THE DA'S KNOWING PRESENTATION OF FALSE HEARSAY TESTIMONY IMPAIRED THE INTEGRITY OF THE GRAND JURY.

Respondent attempts to defend Detective Guy's false and admittedly impermissible hearsay testimony at the grand jury by rewriting the facts, downplaying the prejudice to Addimando, and claiming that false testimony was justified because of the ruminations of an interviewed witness. Respondent does not dispute that the proper remedy for impaired grand jury proceedings is dismissal of the indictment (*see* Resp. Br. at 55-61), even if the defendant is subsequently convicted at trial. *See People v. Huston*, 88 N.Y.2d 400, 411 (1996). In addition to misstating settled law and mischaracterizing the record, Respondent's arguments constitute an extraordinary abdication of the prosecutor's "duty of fair dealing to the accused and candor to the courts." *See People v. Lancaster*, 69 N.Y.2d 20, 26 (1986).

A. Detective Guy's Testimony Was False.

There is no dispute: the DA requested tests to determine whether the gun used to shoot Grover had been wiped of fingerprints and, as she knew, at the time of the grand jury no test had been performed. Moreover, because it is

uncontested that no such test was *ever* performed (Resp. Br at 60), Guy also was not privy to any evidence that the gun was wiped down.¹⁰ On this record, it was wholly improper to submit to the grand jury potent testimony that portrayed Addimando as having a guilty state of mind. To emphasize, the notion presented to the grand jury that Addimando wiped the gun of her fingerprints is entirely false.

Incredibly, Respondent characterizes this false testimony that Addimando took steps to cover up a murder¹¹ as mere “garden-variety hearsay.” (Resp. Br. at 58-60 & n.21.) Even more remarkably, Respondent attempts to justify the DA’s follow-up questions eliciting that baby wipes were in fact used to wipe fingerprints from the gun as simply an intent to “ask for [Guy’s] first-hand observation.” (Resp. Br. at 58.) Respondent further contends that the testimony was “truthful” based on rank speculation, and that even if this testimony was knowingly false it would not impair the integrity of the proceeding. (*Id.* at 59, 60.) Not one of these arguments has merit.

As an initial matter, the testimony the DA elicited was not “garden-variety hearsay,” and in follow-up questions the DA ensured that hearsay was

¹⁰ Indeed, when questioned during trial about Guy’s false testimony, the DA admitted that, following an investigation, no one—including Guy—could identify anyone who supposedly told Guy that the gun had been wiped down. (*See* TT. 1757-59.)

¹¹ As the Respondent’s brief makes clear, rather than conceal her involvement in the shooting, Addimando *initiated* an encounter with law enforcement and then voluntarily stated that she shot Grover. (*See* Resp. Br. at 14.)

converted to false first-hand knowledge. *First*, telling the grand jury that Addimando wiped down the gun, thereby providing the only testimony suggesting Addimando acted with a guilty mind, is central to the second degree murder indictment the DA sought and directly contradicted Addimando’s justification defense. Moreover, the testimony was not simply a single question and answer—rather, the DA pursued the issue to make sure the grand jury got the point. (*See* Opening Br. at 18-19.)

As Respondent admits, although Guy’s first response—“They told us the gun was wiped down”—was impermissible hearsay (Resp. Br. at 58 n.21; *see* TT. 1427, 1757-58), the DA then, in Respondent’s words, followed up to elicit Guy’s “first-hand observations” about the supposed wipe down. (Resp. Br. at 58.) To emphasize, these were “observations” that Guy never had:

- Q. It [the gun] appeared to be wiped down?
- A. Yes.

(GJ. 91.)¹²

Having established Guy’s false “first-hand observations,” the DA bolstered that testimony by “establishing” what was used to perform the fictitious wipe down—inquiring about the presence of “cleaning fluids” at the scene of the

¹² The DA’s initial question that led to this parade of improper testimony was “were there any prints recovered from the weapon?” (GJ. 91), so there was no doubt that “wiped down” referred to wiping off the shooter’s fingerprints. In response, Guy testified: “Prints were not recovered. They told us that gun was wiped down.” (*Id.*)

shooting, the DA asked whether Guy was “ever able to determine *definitively* what was used to wipe the gun down?” (GJ. 97 (emphasis added).) Guy responded that there was “an open container of baby wipes” at the scene of the shooting. (*Id.*) Respondent does not even attempt to justify the premise of the DA’s question that something in fact “was used” to wipe down the gun given that the assertion is complete fabrication.

Nor do any of the “facts” cited by Respondent support its claim that Guy’s testimony can be defended as “truthful.” (Resp. Br. at 59.) To the contrary, as described in further detail below, reliance on those “facts” establishes only that Respondent severely misunderstands a DA’s responsibilities before a grand jury.¹³

First, Respondent alleges that the mere presence of “a container of baby wipes” in a home that included a two-year-old, and “a used baby wipe” found in a trash can (Resp. Br. at 59), supports “the conclusion that . . . testimony [that baby wipes were used to wipe fingerprints from a supposed murder weapon] was truthful.” (*Id.*) Of course, a baby wipe in a trash can does not establish that Addimando did anything, much less wipe down the gun to remove her fingerprints.

¹³ Respondent argues that Guy would never lie to a grand jury because he was a “sixteen year veteran law enforcement officer.” (Resp. Br at 59.) Far from establishing that Guy was truthful, Guy’s experience suggests that he must have known that his testimony was entirely improper. An experienced police officer (not to mention an experienced DA) should have known better than to offer this testimony in a grand jury proceeding, particularly when neither the DA nor Guy could not even identify “who” might have told him the “facts” he represented. (*See* TT. 1757-58.)

While Respondent asks this Court to conclude otherwise by misrepresenting that “a used baby wipe” was found (Resp. Br. at 59 (emphasis added)), the record establishes that “multiple baby wipes” were found—unsurprising in a home with children—not just one supposedly used to wipe down the gun. (See TT. 272 (Detective Honkala testifying that “multiple baby wipes” were found in the trash can).)¹⁴

Second, Respondent cites the deposition of Sarah Caprioli, Addimando’s therapist, in which Caprioli was asked in a leading fashion whether she had “heard anything about the gun being wiped clean,” and responded that “somebody said that the gun might have looked like it was wiped clean.” (TT. 1425.) Caprioli never confirmed the source of her speculation, what was meant by “clean,” or who had cleaned the gun. And there is no evidence that Guy was ever privy to Caprioli’s speculation.

None of this remotely establishes that it was appropriate to provide the grand jury with sworn testimony from a police detective that fingerprints were wiped from the gun with baby wipes, with the only logical conclusion being that Addimando—the sole adult in the home—had done so. And it is startling that

¹⁴ Addimando also testified that Grover used a baby wipe to clean the couch after raping her (TT. 736, 1081), and that she had baby wipes “for the kids.” (TT. 1081.) The DA does not appear to have conducted forensic testing on the baby wipe to address Addimando’s testimony.

Respondent would represent that these “facts” establish the truth of any such testimony.

If this conduct did not impair the integrity of the grand jury, it is hard to imagine what would. *See Huston*, 88 N.Y. 2d at 409-10 (“[A] grand jury proceeding is defective when the integrity thereof is impaired and prejudice to the defendant may result”; an indictment should be dismissed where “prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the grand jury”); (*see also* Opening Br. at 41-42.)

B. The Curative Instructions Did Not Address Guy’s False Testimony.

While acknowledging that Guy’s hearsay testimony was “improper to come out in the grand jury” (TT. 1427), Respondent claims the impropriety was cured by two hearsay instructions. *First*, according to Respondent, “shortly” after Guy testified that “[t]hey told us the gun was wiped down,” the grand jury was told “what one witness is told by somebody else is hearsay.” (Resp. Br. at 58.) *Second*, “[a]t the end of the [grand jury] presentation [the DA] further instructed the grand jury that they cannot consider any hearsay evidence.” (*Id.* (citing GJ. 130-31).)¹⁵

Respondent fails to acknowledge that neither of these hearsay instructions mentioned testimony about Addimando wiping her fingerprints off the

¹⁵ Despite Respondent’s citation (Resp. Br. at 58), this portion of the grand jury minutes has never been disclosed to Addimando.

gun. In fact, the DA gave no hearsay instruction in response to Guy’s testimony that the gun “appeared to be wiped down.” (GJ. 91.) It was only seven questions later, after still more hearsay testimony by Guy about Grover’s gun box being handmade, that the hearsay instruction was given. (GJ. 93.) After six more questions, the DA again elicited hearsay testimony about the gun being wiped down¹⁶ and failed to provide an instruction. (GJ. 94.) Thus, a hearsay instruction was given about the inconsequential issue of Grover’s gun box, but not about whether Addimando wiped her fingerprints off the weapon.

The hearsay instruction at the “end of the presentation” that the grand jury “cannot consider any hearsay evidence” (Resp. Br. at 58) occurred 40 transcript pages after the Guy wipe-down testimony. As an aside, it is hard to imagine why the DA repeatedly pursued this hearsay testimony if she then intended that the grand jury not consider it. In any event, neither instruction cited by Respondent in any way minimized the prejudice to Addimando caused by improper testimony introduced earlier in the proceedings without a curative instruction. *See People v. Gordon*, 101 A.D.3d 1473, 1475 (3d Dep’t 2012) (rejecting argument that curative

¹⁶ “Q. *And you were told*, once that was processed, that what did it appear to have happened? A. *They told us that* there appeared to be residue left over from it being wiped off, consistent with a cleaning solvent.” (GJ. 94 (emphasis added).)

instructions given in response to other inadmissible testimony cured “rank hearsay” introduced earlier without curative instruction).¹⁷

C. There Was a Risk of Prejudice to Addimando by the Unfair and False Grand Jury Testimony.

Finally, Respondent defends the indefensible by claiming that Addimando “was not prejudiced” by Guy’s false hearsay testimony. (Resp. Br. at 61.) Respondent misstates the law and relies on an unsustainable conclusion. An indictment should not stand “where irregularities in presenting the case to the Grand Jury rise to the level of impairing those proceedings and creating the risk of prejudice.” *Huston*, 88 N.Y.2d at 410. The standard relied on by Respondent—actual prejudice—is not the law. *See also* NY CPL §210.35 (grand jury indictment is defective when “prejudice to the defendant may result”).

Here, there was a palpable risk of prejudice from Guy’s false testimony that Addimando, who volunteered to police that she shot Grover but asserted she was justified in doing so, had used baby wipes to remove her fingerprints from the gun. As far as transcripts disclosed to Addimando show, Guy’s false testimony was the only evidence that Addimando’s state of mind supported an indictment that she acted “[w]ith intent to cause the death of another person.” NY Penal Law

¹⁷ The only case cited by Respondent on this point, *People v. Berg*, stands for the unremarkable proposition that a “court’s careful curative instruction . . . , given to the jury *immediately*” after the issue arose, is sufficient to address the issue. 59 N.Y.2d 294, 299-300 (1983) (emphasis added).

§125.25(1). Guy's testimony invited the grand jury to conclude that the shooting was not justified because Addimando acted as if she was guilty, that Addimando had lied about the events by omitting a key detail of what occurred, and that Addimando's state of mind established the necessary intent to support the indictment.

Respondent claims that *People v. Jones*, 27 Misc. 3d 1208(A) (Sup. Ct. Kings Cnty. 2010) is "inapplicable" because (i) unlike here, *Jones* addressed the grand jury proceedings "during the pendency of the case" (Resp. Br. at 60-61); and (ii) Addimando was convicted without the tainted grand jury evidence. (*Id.*) Those assertions, however, are wrong on both facts and law. As in *Jones*, Addimando raised the grand jury improprieties during trial; and whether raised during trial or on appeal, impairment of grand jury proceedings warrants dismissal of an indictment regardless of a conviction being obtained with other evidence. *See Gordon*, 101 A.D.3d at 1477 (dismissing indictment because of hearsay grand jury testimony, although defendant was convicted at trial based on legally sufficient evidence); *People v. Shammass*, 5 Misc. 3d 702, 706-07 (N.Y. Crim. Ct. 2004) ("the impairment of the grand jury process cannot be ignored simply because the prosecution has adduced legally sufficient evidence;" indictment dismissed where the prosecution "mischaracterized and omitted facts which were relevant to the grand jury's

consideration of the defense of justification”); *Huston*, 88 N.Y.2d at 411 (“[C]onviction after trial does not cure defective Grand Jury proceedings.”).

Jones directly rejects Respondent’s contentions. (Resp. Br. at 60-61.)

In *Jones*, a police officer falsely testified to the grand jury that a defendant who asserted self-defense fled a crime scene. The *Jones* indictment was dismissed because the false testimony “conflicted with key components of defendant’s testimony” asserting self-defense, giving rise to potential prejudice (Resp. Br. at 61)—the exact reason for dismissal of the indictment here. Like that of the prosecutor in *Jones*, the DA’s presentation of hearsay and false testimony implied Addimando was a liar whose actions were consistent with guilt. 27 Misc. 3d 1208(A) at *4.

Respondent makes much of the “very high” standard for dismissing an indictment where the prosecution has impaired the integrity of the grand jury (Resp. Br. at 56), but that standard was met here. The DA elicited false hearsay about a critical issue—no fingerprints were recovered because the shooting weapon had been wiped down—knowing there was no basis for it. Both the DA and Guy then converted the hearsay into first-hand knowledge—the gun “appeared to be wiped down”—that the witness in fact did not possess. Next, the DA incorporated into her question—“what was used to wipe the gun down?”—a fact (the wipe down) that she

knew was not supported. And finally, Guy testified that that he knew “definitively” that baby wipes were used to wipe down the gun.

There is no conceivable excuse for this misconduct, or even a reason to introduce this testimony, except to tell the grand jury that Addimando’s acts demonstrated guilt, which supported the murder indictment. This is not a case of a single or isolated “improper comment, elicitation of inadmissible testimony, impermissible question, or mere mistake.” (Resp. Br. at 56 (quoting *People v. Huston*, 88 N.Y.2d 400, 409 (1996)).) Rather, the misconduct was pervasive and firmly establishes the requisite impairment.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING ADDIMANDO’S EXERCISE OF A PEREMPTORY CHALLENGE.

The trial court abused its discretion in rejecting Addimando’s minutes-late peremptory challenge. Respondent claims that the trial court was justified in rejecting the challenge because “multiple additional groups of prospective jurors were considered” (Resp. Br. at 64) before Addimando’s counsel corrected his misunderstanding of whether to challenge juror 10. (Opening Br. at 21.) However, Respondent never explains how accepting Addimando’s challenge would have caused what is legally required to reject it: “discernable interference or undue delay.” *People v. Jabot*, 93 A.D.3d 1079, 1081 (3d Dep’t 2012). (See Resp. Br. at 61-65.)

In fact, no such interference or delay would have occurred. As explained in detail in Addimando’s opening brief (Opening Br. at 20-21, 49-50), just

minutes after juror 10 was considered, Addimando's counsel corrected his misunderstanding of Addimando's instruction and challenged juror 10. (JS. 543, 545.) The entire process—consideration of juror 10 to the belated challenge—spans three pages of a more than 700-page jury selection transcript. (JS. 543-45.) Respondent complains that the cases cited in Addimando's opening brief can be distinguished because they involved a momentary delay (*see* Resp. Br. at 63-64), but that is *precisely* what occurred here.

Moreover, Respondent does not claim that excusing juror 10 would have impacted the DA's approach to juror 16, the only juror selected between initial consideration of juror 10 and Addimando's challenge. Even assuming a possibility of prejudice, the court could simply have reopened challenges to juror 16, adding only a few moments to a jury selection process that would continue for more than two days. *See People v. McGrew*, 103 A.D.3d 1170, 1172-73 (4th Dep't 2013) (court abused discretion by rejecting peremptory challenge made after jury selection had proceeded to the next round of potential jurors).¹⁸

¹⁸ Addimando's opening brief argued that the trial court abused its discretion by failing to cure any theoretical prejudice by reopening challenges to juror 16. That argument does not constitute pursuing an "unpreserved" "alternative remedy" (Resp. Br. at 64-65.), but demonstrates that the court abused its discretion by failing to consider a simple remedy before rejecting Addimando's challenge. (*See* Opening Br. at 50.) Addimando's challenge was preserved by unsuccessfully lodging the peremptory challenge. *See People v. Rosario-Boria*, 110 A.D.3d 1486, 1486 (4th Dep't 2013) (objection to rejection of peremptory challenge preserved by "exercise [of] peremptory challenge against the prospective juror in question, and the court refus[ing] to permit [it]").

Given a defendant's "substantial right" to exercise peremptory challenges, *Jabot*, 93 A.D.3d at 1081, and the uncontested facts, the trial court's improper denial of Addimando's peremptory challenge requires "automatic reversal" of her conviction. *People v. Hecker*, 15 N.Y.3d 625, 661 (2010).¹⁹

IV. THE EXCLUSION OF PROPERLY AUTHENTICATED EVIDENCE PREJUDICED ADDIMANDO.

The trial court refused to admit Exhibits UUU and VVV, which directly tied Grover to Addimando's abuse. This was a key issue at trial as the DA repeatedly argued that Grover was not an abuser, and that Addimando lied when she testified that Grover abused her. (*See* Opening Br. at 21-23.)

As essential support for her defense and to cross-examine a prosecution witness, Addimando offered photographs of her abuse posted to a pornographic website, Pornhub, by a user identifying himself as "Groverespect" and listing accompanying biographical information that, in fact, described Grover. Despite Addimando's authenticating testimony that Grover had taken and posted the photographs, and extensive evidence that Grover exercised dominion and control over the Pornhub profile at issue, the trial court admitted the photos but required

¹⁹ Other cases relied on by Respondent fail to follow the well-established "no discernable interference or undue delay" test. *Compare People v. Monroe*, 118 A.D.3d 916 (2d Dep't 2014) and *People v. Smith*, 278 A.D.2d 75 (1st Dep't 2000) with *People v. Price*, 175 A.D.3d 1436, 1437 (2d Dep't 2019); *People v. Parrales*, 105 A.D.3d 871, 872 (2d Dep't 2013); *People v. Scerbo*, 147 A.D.3d 1497, 1498-99 (4th Dep't 2017).

redaction of material on the photos connecting Grover to them. (See Opening Br. at 53-54.)

A. Addimando Met Her Authentication Burden.

Respondent attempts to justify the rulings below based on the unremarkable propositions that the constitutional right to present a defense is not “unlimited,” and that there is no right to introduce evidence “bearing no assurance of reliability.” (Resp. Br. at 65 (quoting *People v Hayes*, 17 N.Y.3d 46, 53 (2011)).) But the authentication support offered by Addimando was far more persuasive than that offered in cases Respondent cites.²⁰ Indeed, Respondent’s claim that the authenticating proof Addimando offered related only to information on the site itself—the username “Groverespect” and “pedigree information that generally matched [Grover’s] interests and background” (Resp. Br. at 67)—again misstates the record.

²⁰ The authenticating evidence offered by Addimando was far more than both the quality and quantity of evidence offered in the cases cited by Respondent. (See Resp. Br. at 67.) In those cases the proponent relied on authenticating evidence from the social media account itself. In contrast, Addimando offered substantial additional authenticating evidence that tied Grover to the social media account. See *United States v. Vayner*, 769 F.3d 125, 132 (2d Cir. 2014) (presence of the alleged declarant’s “name, photograph, and some details about his life consistent with . . . testimony” was insufficient to authenticate a Facebook account); *People v. Johnson*, 51 Misc. 3d 450, 462 (Sup. Ct. Sullivan Cnty. 2015) (alleged declarant’s name and picture not sufficient); see also *People v. Upson*, 186 A.D.3d 1270, 1271 (2d Dep’t 2020); *People v. Wells*, 161 A.D.3d 1200, 1200 (2d Dep’t 2018). The difference is material and determinative.

First, Addimando authenticated the exhibits by testifying that *Grover took the pictures and posted them to a pornography website.* (TT. 688, 696, 844-45, 1038.) This testimony is authenticating evidence supporting the exact point that Respondent claims is necessary for admissibility, evidence that “the username or account was” Grover’s. (Resp. Br. at 67.)

Second, Addimando also established, as required by *People v. Price*, that Grover “exercised dominion or control over” the profile page in question, 29 N.Y.3d 472, 479 (2017), because Grover was the only person who logically could have posted the photos. (*See* Opening Br. at 53-54.) The photographs depicted Addimando bound by the wrists behind her back and naked in the home that she shared with Grover—suggesting, if not confirming, that Grover, the only other adult living in the home, controlled the images and uploaded them.

Third, there was absolutely no evidence that the profile had been created or used by anyone other than Grover, that someone else did or could have taken the pictures in question, or that those pictures were ever in a third party’s possession. *See People v. Pierre*, 41 A.D.3d 289, 291 (1st Dep’t 2007) (proper authentication where “there was no evidence that anyone had a motive, or opportunity, to impersonate defendant by using his screen name”).

Finally, Addimando authenticated the proffered evidence by pointing to the uncontested fact that the username and profile information contained in the exhibits matched Grover. (*See* Opening Br. at 23-24, 51.)

While the DA undoubtedly could have argued that Addimando's testimony and the other evidence tying Grover to the website should be rejected, that was a decision for the jury, not the trial court. Although the trial court's concern that it is possible to impersonate others online is a reasonable one (Resp. Br. at 69), there was plentiful evidence beyond the website itself to authenticate the excluded exhibits. That evidence established that it was proper for Addimando to introduce the "Groverespect" evidence, and ask the jury to conclude that the photos appeared on Grover's account on the pornographic site. *See People v. Moye*, 2016 WL 1708504 at *7 (Sup. Ct. Queens Cnty. 2016) ("[D]efendant's argument concerning knowing exactly who typed out the message . . . does not defeat admissibility, but rather is more appropriately addressed to the weight of the evidence to be given by the fact finder.").

B. Respondent Misstates the Applicable Legal Standard.

Ignoring Addimando's extensive authentication showing, Respondent seeks to impose an almost insurmountable evidentiary obligation, namely that the proponent of evidence must demonstrate "when, where, or how [comments on a website] were made." (Resp. Br. at 67.) No court has demanded a similar showing.

Indeed, courts acknowledge that the authentication burden is “not particularly high.” *United States v. Gagliardi*, 506 F.3d 140, 151 (2d Cir. 2007). Addimando had to proffer evidence “sufficient to support a finding that there is *a reasonable likelihood* that” Grover controlled the Pornhub account where the photographs appeared. *Moye*, 2016 WL 1708504, at *6-*7 (emphasis added).

Respondent’s proposed evidentiary standard is not the law, and should not be. Doing so would make it virtually impossible to authenticate evidence of physical and sexual abuse that permeates the web, the exact kind of evidence at issue here. The contents of an internet profile are authenticated as belonging to a particular individual by evidence tying the individual to the profile. Demanding the “when,” “where,” and “how” of every posting is neither required nor possible. *See Price*, 29 N.Y.3d at 480 (requiring “sufficient evidence to establish that the web page belonged to, and was controlled by,” the individual); *United States v. Encarnacion-Lafontaine*, 639 Fed. App’x 710, 713 (2d Cir. 2016) (authentication proper where “a limited number of people . . . had information that was contained in the messages”). Contrary to Respondent’s assertion and the trial court’s conclusion, Addimando offered sufficient authenticating evidence beyond that of the internet account itself.

C. Testimony From a Prosecution Witness Was Misleading and “Opened the Door” to Cross Examination With the Pornhub Evidence.

Dr. Stuart Kirschner, the DA’s forensic psychology expert, knew that there was evidence identifying the owner of the Pornhub profile based on his review of the unredacted Exhibits UUU and VVV. (Opening Br. at 24, 57.) Nevertheless, Kirschner testified that the exhibits did not indicate “whose website it was.” (TT. 1929.) As Kirschner well knew, however, the account belonged to “Groverespect.” Whether the information to which Kirschner was privy confirmed that “Groverespect” was Christopher Grover was a determination for the jury, but it was misleading at best to inform the jury that the website screenshots had no identifying information. Nevertheless, the trial court precluded the defense from asking Kirschner to confirm his knowledge that the website did in fact contain account ownership information. (See TT. 2011; Opening Br. at 24.)

This was error. Once Kirschner denied the existence of identifying information, the trial court should have permitted Addimando to argue that the testimony of the prosecution’s key expert was at least misleading by admitting the previously precluded facts. See *People v. Fardan*, 82 N.Y.2d 638, 646 (1993) (where a witness “testifies to facts that are *in conflict with the precluded evidence* . . . [this] ‘opens the door’ on the issue in question”) (emphasis added)).

Respondent's argument that Kirschner's testimony was not misleading because it was consistent with the trial court's exclusion of the evidence at issue (Resp. Br. at 70) makes little sense and turns the evidentiary issue on its head. A witness may not take advantage of an evidentiary ruling by falsely testifying that excluded evidence does not exist merely because it was excluded. This is not the law. *See Fardan*, 82 N.Y.2d at 646; *People v. Morgan*, 171 A.D.2d 698, 699 (2d Dep't 1991) (admitting precluded evidence following defendant's "misleading" testimony); *People v. Rojas*, 97 N.Y.2d 32, 38 (2001) (same). Moreover, by denying Addimando the ability to confront Kirschner about his misleading testimony, the trial court violated her Sixth Amendment rights. (*See* Opening Br. at 58.)

D. The Trial Court's Error Was Not Harmless Beyond a Reasonable Doubt.

Having failed to support exclusion of the evidence, Respondent falls back on the assertion that the ruling was harmless error. While it is true that Addimando was permitted to testify that Grover took and posted the images to Pornhub (Resp. Br. at 71), Respondent ignores the significance of stripping from the photographs evidence that Grover posted them to a pornographic website. Documentary evidence connecting Grover to images of Addimando bound and gagged or with ejaculate on her face obviously would have served as powerful confirmation of Addimando's testimony that Grover abused her, that he was

fascinated with violent pornography, and that he forced Addimando to reenact the pornography he viewed. (*See* Opening Br. at 9-10.)

Conversely, the exclusion of this identifying information from the photographs supported the prosecution's argument that Addimando lied about Grover being her abuser, and allowed the prosecution to argue that Grover had not posted the photographs. (*See* Opening Br. at 55.) Moreover, this clear evidence of how Grover behaved behind closed doors and his association with Pornhub would have been a powerful contrast to the DA's arguments that Grover was a beloved partner, father, and member of the community who could never have abused Addimando. (*See* TT. 2225-26.)

The prejudice to Addimando—and the fact that the erroneous evidentiary ruling was not harmless—is further underscored by the DA's weaponization of the court's evidentiary ruling to attack Addimando's credibility in closing. (TT. 2254-55 (asking the jury to speculate about “who is on the other end of that camera,” and whether it was “[Addimando's] idea” to take and upload the photographs).) This was key evidence whose exclusion and resulting prejudice to Addimando requires reversal. Because there is a “reasonable possibility that the evidence complained of might have contributed to [Addimando's] conviction,” it is obvious that such evidence is not “harmless beyond a reasonable doubt. *Chapman*

v. *California*, 386 U.S. 18, 24 (1967) (quoting *Fahy v. State of Connecticut*, 375 U.S. 85, 86 (1963)).

V. THIS COURT SHOULD RESENTENCE ADDIMANDO UNDER THE DVSJA OR REMAND TO A DIFFERENT JUDGE FOR A NEW HEARING.

Respondent defends the trial court’s decision not to sentence Addimando under the DVSJA because the decision was “lengthy” and “thorough.” (Resp. Br. at 73, 75.) But an opinion divorced from the law it purports to apply is not saved because of its length. Here, the trial court followed neither the express statutory commands of the DVSJA nor the intent of the legislature in enacting it. *Amici curiae*, the New York state legislators (the “DVSJA Legislators”), demonstrated in detail how “the court misapplied the DVSJA and ignored the intent of the legislation,” which “was enacted to protect individuals like Nicole Addimando.” (Brief of *Amici Curiae* N.Y. Legislators (“Legislators’ Br.”) at 2.)

A. Respondent’s Brief Fails to Fairly Portray the Evidence Establishing Grover’s Abuse of Addimando.

Throughout its brief and particularly in support of the trial court’s sentencing decision, Respondent portrays Addimando and her state of mind based on distortions and half-truths about the record, and outmoded and universally discredited ideas about how victims of domestic violence “should” act. Although irrelevant to the four independent grounds for reversal discussed above, Addimando

addresses below a few of Respondent's erroneous contentions in connection with the trial court's failure to correctly apply the DVSJA.

First, Respondent suggests that Grover did not abuse Addimando. (*See* Resp. Br. at 76.) Among other evidence, this flies in the face of her documented injuries from horrific physical and sexual abuse, much of which Addimando could not have physically inflicted on herself. (*See, e.g.*, Opening Br. at 8-11.) Indeed, the trial court found (and then ignored) that Addimando had presented "a compelling story of abuse, with horrific allegations that included repeated, sadistic sexual violence and physical abuse, complete with pictures and eyewitness viewing the results of her abuse." (D&O at 41.)

Neither Respondent nor the trial court acknowledged that on three separate occasions beginning in May 2017, Addimando told medical professionals that Grover was the cause of her injuries. All such evidence was excluded from trial. (*See* Opening Br. at 10-11, 25, n.9.) And Respondent never offers any explanation of how it is even conceivable that Grover, if he had not abused Addimando, could have observed her bleeding, bruises and other horrible injuries and never said a word about them to anyone.

Second, Respondent concocts a theory that Addimando, never in trouble with the law and by all accounts a loving mother, planned to kill Grover, citing a text Addimando sent to a friend five weeks before the shooting that ended

with an emoji, as if Addimando would freely admit her murder plot in writing and then add a grimacing yellow “smiley face” at the end of the supposed confession. (Resp. Br. at 1, 12, 25.) Respondent’s theory of motivation—that Addimando killed Grover to avoid an investigation into her relationship with Grover (*id.* at 11; *see also* Opening Br. at 22)—similarly makes no sense. One does not shoot a partner, and then immediately admit to the shooting, in order to avoid an investigation into your relationship with that partner. Planning to shoot Grover was hardly the way to keep secret Grover’s abuse of Addimando.

Similarly, Respondent claims that it was Addimando, not Grover, who “perform[ed] internet searches on” Grover’s phone concerning how “she” can be shot without detection. (Resp. Br. at 11,18). While Respondent admits that this claim is “theory” (*id.* at 11), it actually is worse. It is baseless speculation without any evidence whatsoever that Addimando carried out the searches or even had access to Grover’s phone.

Third, Respondent’s repeated claims that Addimando aggressively stood up to Grover or that Addimando had an inconsistent recollection of certain minor details (or the trial court’s reliance during sentencing on the fact that Addimando did not flee) is not evidence either that Grover did not abuse Addimando or that Addimando was not justified in shooting Grover. While Addimando may not have acted the way Respondent or the trial court “expects” victims of domestic

violence to behave, as Addimando’s expert witness testified at trial (and as explained in the *amici* brief of service providers to survivors of domestic violence), Addimando’s conduct was entirely consistent with being a victim of Grover’s abuse and acting on the night of the shooting because of that abuse. (*See, e.g.*, TT. 1629; *see also* 1610-21; *see generally* Brief of *Amici Curiae* Sanctuary for Families, *et al.* (“Sanctuary Br.”).)

Finally, Respondent claims that forensic evidence suggests that Addimando shot Grover in his sleep. Respondent neglects to disclose that its own witness confirmed that the forensic evidence was consistent with Addimando’s testimony of precisely how she shot Grover during their struggle over the gun after a night of abuse. (*See* TT. 483-484.)

B. The Trial Court Ignored the Express Requirements of the Statute.

Respondent concedes, as it must, that the trial court *never made a finding* regarding the first required element of the DVSJA: whether Addimando was a “victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household.” NY Penal Law § 60.12(1)(a); (*see* Resp. Br. at 76 (trial court did not “draw any definitive conclusion”); D&O at 42 (“This Court makes no definitive findings as to the level of abuse the defendant endured during her life, or as to which persons(s) have abused the defendant.”).)

Respondent’s defense of the trial court leaving this issue “undetermined” (D&O at 44) is to argue—contrary to the express language of the statute—the court had no obligation to make such a finding if it concluded that the evidence was unclear. (Resp. Br. at 76.) This is plainly incorrect. “When a statute contains a clear mandate, its plain language must be followed.” *Rosato v. N.Y. State Dep’t of Motor Vehicles*, 7 A.D.3d 718, 719 (2d Dep’t 2004) (citing *People v. Robinson*, 95 N.Y.2d 179, 183 (2000)). The trial court did not conclude that Addimando failed to meet any burden she may have had; rather, it simply avoided making any finding *at all*.

Moreover, the decision that this issue was “undetermined” (D&O at 44) was erroneous and unjust. Respondent’s contention that Addimando “did not present sufficient credible evidence” from which the trial court could make a determination regarding whether Addimando had been abused by Grover (Resp. Br. at 76)—unquestionably a member of the “same family or household”—entirely ignores the record.²¹ As the trial court acknowledged, the evidence of severe physical and sexual abuse during the period of time where the *only* person with whom Addimando lived was Grover was “compelling.” (D&O at 41; *see* Opening

²¹ As discussed in Addimando’s Opening Brief, the trial court also erroneously focused exclusively on whether it was Grover who abused Addimando. (*See* Opening Br. at 63 n.17.) Respondent fails to meaningfully address this issue in its brief. (*See* Resp. Br. at 76-77.)

Br. at 66-67.) Additional evidence—including medical reports identifying Grover as Addimando’s abuser (*see id.* at 25, n.9), testimony from witnesses Addimando told Grover was abusing her (*id.* at 27), and the fact that Grover did nothing to respond to Addimando’s visible injuries over the course of their relationship—more than met the first requirement of the DVSJA.

Nor was the evidence “contradictory and inconsistent.” (Resp. Br. at 73-74.) Addimando repeatedly and consistently testified that Grover horrifically abused her. While Addimando admitted that she was unclear about certain details regarding her abuse, Respondent’s contention that this justifies the “conclusion that there were ‘significant, unresolved questions’ about [Addimando’s] history as a purported victim of abuse [and] her relationship with Grover” (Resp. Br. at 73-74 (quoting D&O at 42)) is a gross exaggeration and demonstrates a profound misunderstanding of the impact of domestic violence. Abuse suffered by domestic violence victims, like victims of other severe trauma, often impairs memory of the abuse. (*See* Sanctuary Br. at 17-23 (the trauma of domestic abuse impacts memory, including that “the brain often reconstructs, fragments, or altogether deletes memories of abuse,” which “alter[s] the way in which a trauma victim recalls her experience,” and could cause “the untrained listener” to “perceive her testimony [about the abuse] as vague, nonlinear, or inconsistent”).)

C. Requiring that a Defendant Prove Justification for DVSJA Relief Contravenes the Statute’s Text and Purpose.

The trial court committed a second independent error by refusing to apply the DVSJA on the ground that Addimando could have retreated rather than shoot Grover. Relying on this finding (Resp. Br. at 77-78), Respondent urges affirmance of Addimando’s sentence because she supposedly “had a clear path to her children and to leave the apartment.” (*Id.* at 74.) But relief under the DVSJA is not precluded because a defendant did not retreat or flee rather than commit the crime for which she was convicted. Indeed, the DVSJA only becomes relevant if a defendant’s justification defense has failed and she is convicted. By its express terms, the statute does not and could not require a finding of justification as a condition to imposing a reduced sentence. As *amicus* DVSJA Legislators explain, the trial court’s “interpretation of the Act . . . renders the statute’s conditions practically impossible for any domestic violence survivor to satisfy.” (Legislators’ Br. at 7.)²²

In addition to imposing conditions beyond those set by the DVSJA, the trial court’s reliance on Addimando’s inability to leave her abuser and the supposed “options and opportunities she had to avoid her decision to shoot [Grover]” (D&O

²² Respondent also argues that the trial court “recognized the difference between” entitlement to relief under the DVSJA and the justification defense. (Resp. Br. at 77.) Even if true as a theoretical matter, denying relief under the DVSJA because Addimando failed to retreat clearly conflates the two.

at 45) again misapprehends the reality of domestic abuse and adopts harmful and outdated stereotypes. (See Legislators’ Br. at 7 (trial court “rel[ie]d] on outdated conceptions of how domestic violence victims should act and the circumstances that might lead them to commit crimes, especially against their abusers . . . the Legislature expressly dis[ap]proved of these outdated notions when it chose to enact the DVSJA . . . [and] specifically rejected the idea that an abuse victim should be expected to leave her abuser in order to avoid harsh criminal penalties”); see also Sanctuary Br. at 6-17 (effects of trauma-coerced attachment “can make it impossible for a victim to leave her abusive partner, even when a physical path to do so exists,” and even when external resources are available to her).) Accordingly, the trial court “refused to recognize the DVSJA as the paradigm shift that the Legislature intended it to be” and misapplied the Act by relying on factors the legislation rejected. (Legislators’ Br. at 17.)

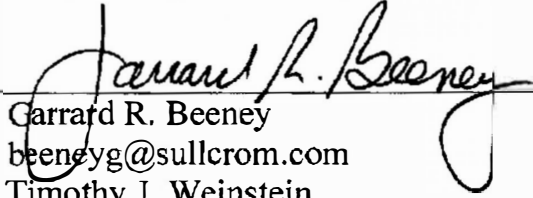
D. This Court Should Resentence Addimando Under the DVSJA or Remand to a Different Judge for Resentencing.

Finally, Respondent objects, without citing relevant authority, to Addimando’s request that if her conviction is not reversed, she be sentenced to a reduced term by this Court or, in the alternative, for remand to a different trial court judge for resentencing. The sole case identified by Respondent, *People v. Suitte*, is inapposite. 90 A.D.2d 80 (2d Dep’t 1982). *Suitte* merely notes in passing that given the sentencing court’s firsthand knowledge of a case, an appellate court should

afford the sentencing court's decision "high respect," while confirming that an appellate court *can* "substitute [its] own discretion for that of [the] trial court" with respect to a sentencing decision, even if the trial court "has not abused its discretion." *Id.* at 85-86; *see also* NY CPL § 470.15(1). Given the errors and trials court's approach to sentencing identified in the foregoing sections and in her opening brief, Addimando respectfully requests that, if this Court does not overturn her conviction, it imposes a reduced term of five years, with a concomitant reduced sentence on the weapon possession count.

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Respectfully submitted,



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