To Be Argued By:
GARRARD R. BEENEY
Time Requested: 15 Minutes

New York Supreme Court

APPELLATE DIVISION—SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

NICOLE ADDIMANDO,

Defendant-Appellant.

DOCKET NO. 2020-02485

BRIEF FOR DEFENDANT-APPELLANT

GARRARD R. BEENEY
TIMOTHY J. WEINSTEIN
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000
beeneyg@sullcrom.com
weinsteint@sullcrom.com

AMANDA F. DAVIDOFF
KAMIL R. SHIELDS
SULLIVAN & CROMWELL LLP
1700 New York Avenue, NW
Washington D.C. 20006
(202) 956-7500
davidoffa@sullcrom.com
shieldska@sullcrom.com

Pro Bono Attorneys for Defendant-Appellant

Dutchess County Clerk's Indictment No. 74/2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION SECOND DEPARTMENT

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

PRELIMINARY STATEMENT

Defendant-Appellant Nicole Addimando ("Addimando") appeals from a judgment of conviction rendered on April 12, 2019, by the County Court, Dutchess County (McLoughlin, J.) of (i) murder in the second degree (Penal Law § 125.25(1)), for killing her domestic partner, Christopher Grover ("Grover"), who had physically and sexually abused Addimando for years; and (ii) criminal possession of a weapon in the second degree (Penal Law § 265.03(1)(b)). Addimando was sentenced to concurrent sentences of 19 years to life imprisonment on the first count and 15 years imprisonment with five years post-release supervision on the second count.

Timely notice of appeal was filed. Addimando is presently incarcerated.

QUESTIONS PRESENTED

1. Did the trial court violate Addimando's right to counsel of her choice by disqualifying the Dutchess County Public Defender ("DCPD") solely because another member of DCPD had represented a potential witness in connection with an unrelated DWI offense six years earlier, and notwithstanding Addimando's knowing waiver of any purported conflict?

2. Was the integrity of the grand jury compromised by the introduction of improper hearsay testimony, which the prosecution knew or should have known was false, and which severely undermined Addimando's credibility and justification defense?

3. Did the trial court err in rejecting a peremptory challenge made minutes after the juror at issue was considered and well before the trial jury was empaneled?

4. Did the trial court erroneously deny Addimando's due process rights to present a defense and to cross-examine witnesses by (i) refusing to admit evidence showing that Grover posted on a public website violent images of his sexual abuse of Addimando, despite proper authentication for the evidence; and (ii) refusing to allow the evidence to be used for impeachment in cross-examination when a prosecution witness denied the evidence existed?

5. Did the trial court err in failing to sentence Addimando under the Domestic Violence Survivors Justice Act ("DVSJA"), NY Penal Law § 60.12, by misapplying the statutory language, rejecting overwhelming evidence that Addimando met the statutory requirements for a lesser sentence, and requiring Addimando to demonstrate that she was justified in killing Grover, despite the statute's express provision that it applies even when no justification defense is raised?

INTRODUCTION

Nicole Addimando was horrifically abused—sexually, physically, and emotionally—by her domestic partner Christopher Grover over the course of their relationship. Addimando's injuries included facial bruises, burns on her breasts and genitalia, whip lacerations, and severe genital and anal injuries. That abuse culminated in the tragic events of September 28, 2017, when Addimando shot Grover in a struggle after a night of Grover's intimidation, violence, and homicidal threats.

The previous day, Addimando and Grover had been visited by Child Protective Services ("CPS") regarding Grover's violence. Following that visit, Addimando mustered the courage to tell Grover that after years of his cruelty, she intended to leave with their two young children. Grover responded by loading his handgun in front of Addimando and showing her descriptions on his phone of how

he could shoot her in her sleep and make it appear to be a suicide. When Grover actually pointed the gun at Addimando a few hours later, the two struggled, and Addimando obtained the weapon and aimed it at Grover. Demanding it back, Grover threatened that he would kill both of them so that their "kids would have no one." Before Grover could grab the gun, Addimando lunged and shot him.

Addimando was indicted for intentional murder and criminal possession of a weapon in the second degree. At trial, she testified to a horrific history of Grover's sadistic abuse and that she shot Grover out of fear for her life and that of her children. The prosecution theorized that after more than four years of living exclusively with Grover and their children, Addimando's severe and plainly visible injuries were inflicted by someone else or by Addimando herself. The prosecution further argued that forensic evidence showed that Addimando, a loving mother of two young children who had no criminal history or prior violent conduct, intentionally shot Grover in his sleep because she feared that her reports of Grover's abuse to healthcare providers would be revealed as false.

After deliberating for three days, the jury found Addimando guilty. Although the jury rejected Addimando's justification defense, the path to her conviction, from indictment through sentencing, was paved with fundamental errors that require dismissal of the indictment and reversal of her conviction or, at the very least, resentencing under the DVSJA.

First, Addimando was deprived of her constitutional right to counsel of her choice. For eight months after her arrest, Addimando was represented by Kara Gerry, an experienced attorney from DCPD. The prosecution moved to disqualify Gerry and DCPD, claiming that another attorney at DCPD had, six years earlier, represented a potential trial witness on a DWI charge. The disqualification of Addimando's counsel misapplied controlling law. Neither Gerry nor DCPD had a conflict under applicable ethical rules because: (i) the DWI offense was not substantially related to the allegations against Addimando; (ii) Addimando's counsel, Gerry, had neither represented the potential witness, Cesar Betancourt, nor even worked for DCPD at the time that DCPD represented Betancourt; and (iii) Addimando waived any purported conflict after consulting with independent counsel about her decision. The trial court rejected Addimando's knowing waiver, adopting the prosecution's claim that the witness was "crucial" (although once disqualification was achieved, neither side called Betancourt at trial). The erroneous disqualification of Addimando's counsel of her choice requires reversal of her conviction.

Second, the integrity of the grand jury was compromised by the introduction of material testimony that was both hearsay and false—sworn to by a police detective—that baby wipes were used to wipe fingerprints off of Grover's gun after Addimando shot him. That testimony implied Addimando had shown

consciousness of guilt by wiping the gun, thereby belying her justification defense, and undermining her credibility about the night of the shooting. Despite knowing that there was *no* factual basis for the "wipe down" assertion—at the time of the grand jury or ever—the prosecution not only left the hearsay testimony uncorrected, it exacerbated the error and prejudice to Addimando by confirming no less than four times with the detective that the gun in fact *had been* wiped down. This misconduct, eventually acknowledged by the prosecution, impaired the integrity of the grand jury proceeding. The indictment should be dismissed on this independent ground.

Third, Addimando was unjustifiably denied her right to exercise a peremptory challenge during jury selection. The challenge—to correct counsel's misunderstanding of Addimando's instruction to challenge the juror—was made just minutes after the potential juror was considered and before any jurors had been sworn. The trial court's refusal to strike the juror despite the absence of any prejudice to the prosecution or the process deprived Addimando of her right to a fair and unbiased jury in a case where there was significant potential for juror bias.

Fourth, the trial court twice erroneously excluded evidence showing that Grover posted images of his abuse of Addimando on a pornographic website; first ruling that the evidence had not been authenticated, and later that a prosecution witness could not be cross-examined with the excluded evidence, notwithstanding the witness's misleading testimony that the excluded evidence did not exist. The

prosecution used the court's rulings, arguing in summation that: (i) there was no proof Grover had abused Addimando; (ii) there was no evidence that Grover uploaded the pornographic videos; and (iii) that Addimando's testimony about these and other matters was false.

Finally, if the indictment is not dismissed or a new trial not granted, Addimando should be resentenced under the DVSJA. She fully meets the statute's qualifications for reduced sentencing: (i) Addimando is a victim and survivor of physical, sexual and psychological domestic violence; (ii) the abuse was a "significant contributing factor" to her criminal behavior; and (iii) in light of the abuse and Addimando's lack of criminal history, the sentence of 19 years-to-life imposed by the trial court is "unduly harsh." The record on appeal is ample to allow this Court to impose its own sentence under the DVSJA. If there is a remand for resentencing under the DVSJA, remand should be to a different judge.

These errors—individually and in sum—unfairly deprived Addimando of her basic constitutional and statutory rights and impugned the integrity of the proceedings. Addimando respectfully asks that this Court dismiss the indictment and reverse her conviction or, at the very least, resentence her under the DVSJA.

STATEMENT OF THE FACTS

A. BACKGROUND

1. Grover's Abuse of Addimando

Addimando and Grover met in 2008. (TT. 639.) From the beginning, Grover was "aggressive" with Addimando, and in 2011, he forced non-consensual sex on Addimando. (TT. 795, 799, 1853.)[1]

Grover's abuse of Addimando became a regular pattern after the birth of their first child, Ben, in 2012. Shortly after Ben's birth, Grover responded to Addimando declining his demand for sex by slamming her head into a doorframe and forcing intercourse. (TT. 640; Ex. FFF (photograph showing facial bruising).) Thereafter, Grover would "hold [Addimando] down with his hands" and "take it when he wanted it." (TT. 644-45.)

The abuse escalated in 2014 when Addimando became pregnant with their second child, Faye. (TT. 646, 722.) When a pregnant Addimando "shrugged [Grover] off" after he kissed her ear, Grover bit her shoulder, slammed her face on the counter, and raped her in their kitchen. (TT. 647-48.) After this attack, Addimando went to Vassar Brothers Hospital because "it hurt to chew" and "to open

[1] "TT." refers to pages of the trial transcript; "JS." to pages of the jury selection transcript; "GJ." to pages of the Grand Jury transcript; "ST." to pages of the sentencing hearing transcript on the applicability of the DVSJA; "DT." to pages of the transcript of the May 13, 2018 hearing on the disqualification of counsel; and "HT." to pages of the transcript of the June 6, 2018 New York Supreme Court hearing granting Addimando's writ of habeas corpus.

[her] mouth." (TT. 648.) At the hospital, Addimando underwent a forensic nurse examination—the first of many times she would report injuries caused by Grover to medical professionals—and the nurse photographed the abuse. (TT. 648-51; Exs. GG-HH.)

Two days later, Grover attacked Addimando again: Grover "wanted to have sex," but Addimando demurred because Ben "was going to be up soon." (TT. 652-53.) In response, Grover used a heated metal spoon to burn Addimando's breast, thigh and genitalia "over and over and over again." (TT. 654-57.) Fearful for her unborn child, Addimando again went to the hospital, where nurses treated and recorded the injuries Grover inflicted. (TT. 657-62, 1487-92; Exs. II-JJ, LL, OO-QQ (photographs of Addimando with bruises and burns).)

Grover's violence against Addimando continued, with Grover burning Addimando "multiple times." (TT. 663.) In December 2014, Addimando was about to shower when she rejected Grover's demand for sex. Grover then removed her bathrobe, tightened the bathrobe belt around her neck, and pushed her to her knees, strangling her. (TT. 664-65.) Addimando "thought [she] was going to pass out"; then Grover raped her. (TT. 665.) A photo of Addimando from February 9, 2015, the day Faye was born, shows severe bruising on her breast. (TT. 666; Ex. RR.)

After Faye was born, Grover turned to violent pornography, demanding that Addimando reenact the scenes he viewed. (TT. 666-67.) Grover repeatedly

hogtied and raped Addimando, sometimes leaving her tied for hours. (TT. 667-68, 687-88; Exs. SS-TT (photographs showing wrist lacerations).) Grover also constructed objects of torture to abuse Addimando, including a whip, a ball gag, and weapons made out of PVC pipe. (TT. 667-68, 689-90, 700.) Addimando later discovered Grover surreptitiously filming her abuse and posting the images to a website called "Pornhub"—a website used to upload pornography (TT. 696.) The Pornhub photographs documented horrific abuse of Addimando: naked on their bathroom floor, her wrists bound; being abused with an inanimate object; with ejaculate on her face; with her mouth gagged; and being choked by a bathrobe tie. Multiple posted pictures show bruises and whip lacerations on her buttocks as she struggled to escape the restraints. (Exs. GGG-MMM; TT. 688-96.)

Throughout 2016 and 2017, Grover continued to burn Addimando, "always in the kitchen and always from a spoon." (TT. 697; Ex. XX (2016 photograph showing burn mark on her breast).) When feeling "disrespected," Grover "backhanded" Addimando and left bruises. (TT. 699; Ex. YY (2017 photograph showing facial bruises).) Grover forcibly penetrated Addimando vaginally and anally with "fake knives" made of PVC. (TT. 700.) Once, Grover forcefully raped Addimando with a bottle. (TT. 706-07.)

On three occasions in 2017, Addimando reported these injuries to Susan Rannestad, the midwife who delivered her daughter. (TT. 702.) Rannestad testified

at trial that she observed significant damage to Addimando's face, breasts and genital area. In Rannestad's May 2017 exam, Addimando's vulva was "bruised and bleeding on the outside," and had "scarring, healing over, [and] adhesions"; "parts of [Addimando's] body from the inside [] were prolapsed out," meaning that Addimando's rectum and vulva "had swelling that protruded" out of her body as a result of trauma. (TT. 1289.) Rannestad, a 20-year certified professional midwife, "had a hard time looking" at Addimando's injuries. (*Id.*)

At a June 2017 exam, Rannestad saw "bruising and swelling" to Addimando's pelvis, face and wrists, and swelling in the pelvic area—her "vaginal area was swollen shut"—with "ripped skin [that was] bleeding and hanging," and "frank bright red blood coming out of it." (TT. 1291-94.)

And at an August 2017 exam, Rannestad observed that Addimando's face was battered with bruised nostrils, and bruising or cuts on her lip. In addition, Addimando's vulva was "bruised and bleeding and cut," and Addimando was bleeding from her rectum. (TT. 1294, 1297, 1299; Exs. AAA-CCC.)

2. The Shooting

On September 26, 2017, Addimando and Grover learned that CPS had received an anonymous complaint about Grover's violence. (TT. 719-20.) That night, Addimando observed Grover carrying a bag of his external hard drives, whip,

gag, and spoons. (TT. 751-52.) Grover told Addimando that he was "taking care of this." Addimando never saw those objects again. (TT. 752.)[2]

The next day, Addimando told CPS that "everything was fine." She explained at trial that she was terrified that Grover's violence would escalate if she revealed it. (TT. 721.) The night of the CPS interview, however, Addimando suggested to Grover that they "separate for a little while," telling him that "no one has to know," and that he could see the children every morning before going to work. (TT. 729.) Addimando begged Grover, "just let us go." (TT 734.)

Enraged by her suggestion that she would leave, Grover retrieved, assembled, and loaded his gun in front of Addimando and told her that "he could kill [her] in [her] sleep." (TT. 730-31, 1043.) When Addimando reached for her phone, Grover ordered her to turn it off, and then showed her "diagrams of the brain" on his phone, demonstrating where he could shoot her and make it appear to be a suicide.[3] (TT. 731-32; Ex. 8.)

---

[2] In addition to "taking care" of this evidence of his abuse, the following night, Grover submerged his laptop in their bathtub. (TT. 749.) Addimando suspected that the photographs of her that Grover uploaded to Pornhub were on that laptop (TT. 751), although no such photographs were recovered. (TT. 386-87.)

[3] Exhibit 8 documented Google searches on Grover's phone from the night of the shooting for (i) the "part of the brain to shoot in [a] suicide" and (ii) "will police know if she was asleep when I shoot [sic] her." (*See* TT. 113-14.) The prosecution claimed—without any evidence that Addimando ever had access to or the password for Grover's phone—that Addimando "did the searches" for this information "when [Grover] was asleep." (TT. 2300.) The court excluded an additional 58 internet searches on Grover's phone for pornography and 12 related to suicide. (*Compare* Ex. AA (excluded) *with* Exs. AA-1, 8 (admitted into evidence)). The sheer volume of these excluded searches (and the topics they contained) supported Addimando's description of

Terrified, Addimando retreated to the bathroom; Grover followed. (TT. 732.) When Addimando stepped into the shower, Grover threatened he could "shoot [her] in the shower, but it would echo." (*Id.*) He then left the bathroom, taking Addimando's phone—her sole means to seek help. (*Id.*)

The night of terror continued. Addimando dressed and walked into the living room, where Grover pushed her down, shoved his penis into her mouth, grabbed her by the throat, and pulled her onto the couch. (TT. 733-34.) As Addimando pleaded again with Grover to "just let us go," Grover raped her. (TT. 734-36.) Bleeding vaginally, Addimando went to soothe her daughter, awakened during Grover's assault, and stayed with Faye until she fell asleep. (TT. 736-39; Ex. I (Addimando's bloodied underwear).)

Upon leaving Faye's room, Grover ordered Addimando to lie on top of him on the couch. When Addimando thought that Grover had fallen asleep, she tried to get away but Grover awoke, and grabbed his gun. (TT. 741-42.) The two struggled and Grover dropped the gun, which Addimando retrieved and pointed at Grover. (TT. 742-43.) Grover threatened, "you're going to give me the gun. I'm going to kill you, I'm going to kill myself, and then your kids have no one." (TT.

Grover as abusive and addicted to pornography, and further belied the prosecution's claim that Grover did not fit the profile of an abuser and did not himself conduct the searches.

743.) Believing Grover's threat to kill her, Addimando lunged towards Grover and pulled the trigger. (TT. 744, 746.)

Addimando immediately took her children into the car to drive to the police. A few blocks away, she was stopped at a traffic light when a police car pulled up behind her. Addimando got out of the car and told the police officer that she had shot Grover. (TT. 749-50.)

In statements to police immediately after the shooting, Addimando consistently described the shooting as an act of self-defense. The prosecution acknowledged that Addimando told the first police officer she encountered "that she had been in a fight with Christopher Grover, there was a gun, she tried to leave but he said he would kill her," and that later at the police station, "defendant once again stated she had acted in self-defense and then began to outline again the alleged history of abuse she suffered at the hands of deceased." (District Attorney Chana G. Krauss, Affirmation in Support of Notice of Motion to Recuse ("Krauss Affirmation") at 4.)

B. DISQUALIFICATION OF COUNSEL

After her arrest, Addimando was represented by Kara Gerry of DCPD. (Disqualification Decision & Order ("DQO") at 1.) Over the next eight months, Gerry conducted an extensive investigation—interviewing witnesses, locating physical evidence, ordering hospital reports, and speaking to potential experts.

Among other things, Gerry served on the prosecution (i) an "exhaustive list" of defense witnesses; (ii) a pre-indictment submission arguing that Addimando should not be indicted; (iii) notice that Addimando would testify at the grand jury; (iv) a list of witnesses for the grand jury; and (v) notice that, if indicted, Addimando would proffer psychiatric evidence. (Krauss Affirmation at 5, 8-9.)

Among this and other evidence in support of Addimando, Gerry identified Cesar Betancourt as a person who previously had abused Addimando. (DQO at 4-5.) More than six years earlier, in 2011, Betancourt had been represented by DCPD on a DWI charge—though not by Gerry or any other DCPD lawyer working on Addimando's case.[4] (Letter from Kara M. Gerry, Bureau Chief Criminal Dept., to Judge Edward T. McLoughlin (May 1, 2018) at 2.) Indeed, Gerry, who started at DCPD two years *after* the Betancourt representation ended, knew nothing about Betancourt or the DWI. Betancourt's DWI file was archived in a separate office and was inaccessible to Gerry. (*Id.* at 2-3.)

On May 8, 2018, the prosecution moved to disqualify Gerry based solely on the assertion that DCPD's six-year-old representation of Betancourt

[4] Shortly before the grand jury was empaneled, Betancourt called the DCPD and said that he had been contacted by the prosecution but did not wish to speak to them. (DQO at 2.) The DCPD staff informed Betancourt that he was under no obligation to talk to anyone and that DCPD could obtain counsel for Betancourt, but explained that the office could not represent him in light of its ongoing representation of Addimando. (*Id.*)

created an "actual conflict operating on the defense" that would preclude Gerry from cross-examining Betancourt at trial if he testified. (Prosecution's Reply to Affirmation in Opp'n at 4.) The prosecution claimed it sought to remove Addimando's counsel over Addimando's objections "to protect [her] sixth amendment [sic] right to the effective assistance of conflict-free counsel and ensure that any conviction, if obtained, is not subject to late attack due to counsel's actual unwaivable conflict of interest." (*Id.* at 7.)

As an alternative to the drastic remedy of disqualification, the prosecution moved "to obtain from [Addimando] her informed decision to either consent to being represented by current counsel, or request to be represented by another retained or assigned attorney." (Notice of Mot. to Recuse at 2.) To keep her trusted counsel, Addimando argued that no conflict existed, that the prosecution had overstated Betancourt's importance to the case, and that she did not intend to call Betancourt as a witness. (Affirmation in Opp'n at 1, 9.)

The trial court appointed independent counsel to advise Addimando about the prosecution's disqualification motion. Counsel informed the court that he had advised Addimando on the relevant issues and that she knowingly waived any alleged conflict, providing the prosecution with the alternative relief requested in its disqualification motion. (DQO at 3.)

On May 23, 2018, the trial court disqualified Gerry and DCPD, accepting the *prosecution's* determination that because Betancourt was "crucial" to Addimando's case, there was an "unwaivable conflict of interest." (DQO at 7-8.) The court did not explain why it had provided conflicts counsel to Addimando and then held a hearing to obtain assurances of a knowing waiver given its ultimate decision to reject that waiver. The court also did not explain how the alleged conflict—Betancourt's DWI—could possibly be relevant to his cross-examination, if he ever was called as a witness.

After eight months of active representation by an attorney that she trusted, Addimando was forced to retain new counsel. Betancourt never testified at trial.

C. THE GRAND JURY AND FORENSIC TESTING OF THE GUN

On January 11, 2018, the prosecutor asked the police lab "if there was a way to test" whether the gun had been "wiped clean." (TT. 1425; *see* Def.'s C.P.L. § 330.30 Mot. to Set Aside Verdict at Ex. C (lab technician's notes of a call with the prosecutor: "Trace exam (for baby wipe residue). May also be needed on swabs from the weapon.").)[5]

[5] Eighteen days later, the prosecution continued to pursue the issue at a deposition, obtaining testimony that "somebody said that the gun might have looked like it was wiped clean." (TT. 1425.) The prosecution recognized the significance of this issue to Addimando's justification defense and promptly notified Gerry of the unsubstantiated "wipe down" hearsay. (TT. 1425-26.)

However, no test for residue or "wiping" ever was performed. (*See* TT. 364, 444-45, 1193.) In the end, the gun was tested for fingerprints, blood, operability, and DNA; but as the prosecution knew after raising the issue, there was no evidence that Addimando or anyone else had wiped down the gun. (TT. 436, 1177, 1193, 1218.)

Nevertheless, when the grand jury convened on June 20, 2018, the prosecution provided the grand jury with false hearsay testimony that the gun had been wiped down, undermining both Addimando's defense and her credibility.[6] Specifically, Detective Jason Guy, one of five grand jury witnesses,[7] testified that unidentified police experts had reported that the gun was wiped down:

> Q. Were there any prints recovered from the weapon?
> A. Prints were not recovered. *They told us that the gun was wiped down.*

(GJ. 91 (emphasis added).)

The prosecutor followed up, converting hearsay to first-hand knowledge of a "fact" for which the prosecution had no support:

> Q. It appeared to be wiped down?
> A. Yes.

---

[6] Although Addimando planned to testify before the grand jury until her counsel was disqualified (DT. 10; Krauss Affirmation at 6), she did not do so when forced to retain new counsel a month before the grand jury heard testimony.

[7] Shortly before trial, the prosecution produced transcripts of three grand jury witnesses; the two other witnesses were never identified to defense counsel. The produced transcripts were appended as exhibits to Addimando's May 14, 2019 C.P.L. Section 330.30 Motion to Set Aside the Verdict.

(GJ. 91.)

The prosecutor did not instruct the grand jury to ignore this hearsay testimony which the prosecution knew was unsupported. Instead, the prosecutor continued to confirm for the grand jury "facts" that were untrue:

> Q. *And you were told*, once [the gun] 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).)

And in a fourth reference to false gun wipe-down hearsay, the prosecutor, assuming a fact in her question that she knew was entirely unsupported, elicited false testimony that it was "determine[d] definitively" that baby wipes were used to "wipe the gun down":

> Q. Were there any cleaning fluids or clothes or anything located near where Christopher Grover or the gun was, or *were you ever able to determine definitively what was used to wipe the gun down*?
> A. On the floor next to -- it's not in that picture, but it's next to where -- it was on the rug, *there was an open container of baby wipes*.

(GJ. 91-97 (emphasis added).)

On each of these four occasions, the prosecution failed to correct the false testimony or provide a hearsay instruction.

When this testimony was first disclosed to the defense just before trial, defense counsel moved to dismiss the indictment, arguing that the testimony had been false and that the prosecutor would have known it was false at the time. (TT. 1411.) In response, the prosecution acknowledged that "we have no information that any of the forensic people have ever said" that the gun was wiped clean, or that solvent was found. (TT. 1427.) The prosecution also admitted that Detective Guy's testimony was "improper to come out in the grand jury." (*Id*.; *see also* TT. 1757-58.)

Nonetheless, the court denied the defense motion to dismiss, holding that there was other, sufficient evidence to support the indictment. (TT. 1434; *see* Decision and Order on Mot. to Set Aside Verdict.) The court did not address whether the integrity of the grand jury had been impaired.

D. JURY SELECTION

On March 15, 2019, 20 prospective jurors proceeded to *voir dire*. (JS. 472.) Following counsel's questions (JS. 504-40), the court heard challenges in three groups (jurors 1-12, then 13-19, and then 20). (JS. 541-544.) In a process lasting a few minutes that spans three pages of transcript, the parties challenged seven of twelve jurors from the first group, six of seven from the second group, and the sole juror in the third group (JS. 541-44):

Prospective Jurors	For Cause	Peremptory (People)	Peremptory (Defense)	Unchallenged
1-12	12	3, 8, 9, 11	1, 4	2, 3, 5, 7, **10**
13-19	N/A	13, 14, 17, 19	15, 18	16
20	N/A	N/A	20	N/A

After prospective juror 20 was removed, but before any juror was sworn or seated, defense counsel asked to strike prospective juror 10, explaining that "my client had indicated to me that she did not want number 10," but that counsel had not understood Addimando's direction. (JS. 543, 545.) The trial court refused, stating that the parties were "past that point" because "both sides may have a strategy to what they like to choose, how many they have left, it can affect that process." However, at that point in the proceedings, *all but one* of the prospective jurors considered after juror 10 had been excused based on peremptory challenges. (JS. 545.) The court later empaneled the jury, including the juror Addimando had attempted to strike. (JS. 550-698.)

E. THE TRIAL

Trial began on March 18, 2019. The prosecution called nine witnesses in direct and four in rebuttal; the defense presented fifteen witnesses.

1. The Prosecution's Case

The prosecution advanced two main theories: *first*, it argued that Grover had not abused Addimando, and *second*, it contended that the forensic evidence showed that Grover had been shot in the temple at close range. The

prosecution suggested that Grover must have been sleeping for the injury to have occurred in this way.

Putting its theories together, the prosecution suggested that the shooting was premeditated murder, and speculated that Addimando killed Grover because she feared that her identification of Grover as her abuser would be deemed false, and she would lose custody of her children. (*See* TT. 4-6, 2237.)

Against the mountain of evidence that Grover had severely abused Addimando, the prosecution steadfastly asserted that the abuse was fabricated, or, if documented, self-inflicted (*see* TT. 2254-55, 2270) or, if not self-inflicted, caused by someone other than Grover (*see* TT. 2212-24).[8]

In aid of its theory that Grover was not abusive, the prosecution focused on a handful of text messages that Addimando sent to Grover that it characterized as "disrespectful," arguing that Addimando would never have sent such "berating text messages" to a violent partner. (TT. 2286-87.) The prosecution also relied on deposition testimony from Rannestad that: "I think they were both sick and probably abusive to each other"; Addimando "was controlling of [Grover] even though she

[8] *See, e.g.*, TT. 2255 ("You have to ask yourself who is on the other end of that camera? Is it consensual? Is it Chris Grover? Is it the defendant's idea?"); TT. 2270 ("You're going to have to determine what is truthful, what really happened, what didn't happen, what was consensual what was self-inflicted."); TT. 2272 ("What, if any of this is sexual foreplay that she introduced? What, if any, of this is self-inflicted?").

claimed that he was her abuser"; and Addimando had said she wanted to document her injuries to obtain custody of her children. (TT. 1345-46, 2262.)

Addimando was, according to the prosecution, an unlikely "traditional" victim of domestic violence because Grover allowed her to earn money (about $1,000 per year in a sewing business), keep a small bank account with her father, and use Grover's car. (*See* TT. 2252, 2292.) And, the prosecution argued, if Grover was truly her abuser, Addimando would have left her home, called the police, and taken other steps to escape. (TT. 2248-49, 2252.)

The prosecution also focused on Grover's reputation as someone "loved" at work and who loved his family, arguing in summation that Grover "wasn't the man she claimed he was. And if he wasn't that man, then challenge everything she tells you about the night she killed him." (TT. 11, 2225-28.)

To address the sadistic and demeaning Pornhub photos introduced by Addimando, the prosecution argued that they were either consensual or had not been taken by Grover. In support, the prosecution successfully challenged evidence establishing Grover as the person who uploaded the photos. The photos—which showed Addimando in the home that she shared with Grover, typically with her hands bound behind her back—were uploaded by a Pornhub user named "Groverespect" whose biographical information accurately described Grover (a 29-year-old male interested in cinematography and martial arts). (TT. 1557-60; Exs.

UUU-VVV.) The court excluded the "Groverespect" profile and any reference to it, ruling that the profile had not been authenticated as belonging to Grover. (*See* TT. 2111-14.) The court concluded that only Pornhub, located in Cyprus (and thus outside the subpoena power of the court), could authenticate the account user. (*See* TT. 2113; Decision and Order on Mot. to Set Aside Verdict at 4-5.)

The prosecution also called Dr. Stuart Kirschner, who testified that Addimando's actions were inconsistent with those of a domestic violence victim. After the "Groverespect" profile associated with the Pornhub photos was excluded, Kirschner testified that the Pornhub screenshots "didn't say how [the photo] got there and whose website it was." (TT. 1929.) When Kirschner reiterated on cross-examination that he was not aware of anything "corroborat[ing] . . . who put [the pictures of Addimando on the website], [or] how they got there," the trial court again refused to admit evidence that the person posting the photos of Addimando used the "Groverespect" user name and had identified personal characteristics that described Grover. The court thus prevented defense counsel from confronting Kirschner with evidence that directly undermined the credibility of his testimony. (TT. 2008-11.)

In support of its claim that Addimando intentionally killed Grover in his sleep, the prosecution pointed to evidence that the gun was touching Grover's temple when he was shot. (TT. 4-6, 471, 2198-99.) The prosecution also claimed that Addimando provided inconsistent explanations of how Addimando had

obtained the gun—either that she had kneed Grover in the groin or that she hit Grover's arm, causing the gun to fall. (*See* TT. 215.)

The prosecution focused heavily on a text that Addimando sent to a concerned friend on August 16, 2017—six weeks *before* she learned that CPS was investigating Grover—stating: "It's ok. I haven't figured out how to kill him without being caught so. I'm still here." (Ex. CCCC.) Addimando testified that the text was "sent in jest" after years of trauma caused by Grover. (TT. 717.)

2. Addimando's Defense

Addimando testified over three days to a long history of violence and sexual degradation by Grover. Other witnesses testified that they observed Addimando's injuries beginning in January 2013. For example, Elizabeth Clifton, Addimando's children's music teacher, testified that she saw Addimando with bruises on her face and "wincing" in pain on "multiple occasions." (TT. 1363-65.) When Clifton pressed her, Addimando identified Grover as her abuser. (TT. 1379.) Rannestad, Addimando's midwife, who observed severe injuries during three exams in 2017 (*see supra* at 10-11), testified that Addimando told her that she "didn't have a problem with [Grover] being alone with the children, [because] it was just her that he hurt." (TT. 1356.)[9]

[9] Three medical reports recounted that Addimando had identified Grover as the person who caused her injuries. The court excluded these reports from evidence at trial; they were later admitted at the sentencing hearing (*see* Addimando Pre-Sentence Mem., Exs. 2-3).

The defense also introduced numerous photographs taken by third parties depicting Addimando's extensive injuries (*see* Exs. II, JJ, KK, LL, MM, NN, OO, PP, QQ, RR, SS, TT, UU, VV, WW, XX, YY, AAA, BBB, CCC, BBBB), and other photographs of her being sexually tortured, which Addimando testified were taken by Grover and then uploaded by him to Pornhub. (*See* Exs. DDD, GGG, HHH, III, JJJ, KKK, LLL, MMM; TT. 688, 1038; *see also supra* at 8-11.) Finally, Addimando testified at length about Grover's terrifying threats to kill her and the circumstances under which she shot Grover. (*See* TT. 728-57; *supra* at 11-14.)

To address the prosecution's claims of how Addimando, a survivor of domestic abuse, "should have" acted, the defense called Dr. Dawn Hughes, who explained to the jury that Addimando's decision to remain with Grover and her other actions were consistent with scientific understanding of the impact of domestic violence. (TT. 1610-11.) Hughes noted that, despite what might seem to others as an opportunity for escape, domestic violence victims are often unable to leave. (TT. 1614, 1621, 1643-44.) Indeed, it was Addimando's suggestion that she might leave that caused Grover's violent response and the events of the night of the shooting. *See supra* at 12.

* * *

On April 12, 2019, after almost three days of deliberation, the jury found Addimando guilty of murder in the second degree and criminal possession of a weapon in the second degree. (TT. 2470-71.)

F. SENTENCING

On September 9, 2019, the trial court began three days of hearings to determine whether Addimando merited relief under the DVSJA, passed just weeks after Addimando's conviction. The statute permits reduced sentences for (i) victims of "substantial" domestic violence where (ii) that violence was a "significant contributing factor" to the defendant's crime and (iii) a sentence without modification would be "unduly harsh" in the circumstances. The DVSJA expressly allows judges to consider "reliable hearsay" evidence in addition to the trial record. *Id.* § 60.12(1).

At the hearing, two witnesses, Addimando's therapist, Sarah Caprioli, and her landlord, testified that Addimando had identified Grover as her abuser at the time of her injuries. (ST. 61-62, 76, 47.) Caprioli further testified that she had witnessed Addimando receive a death threat from Grover via text message. (ST. 118-19.) The defense also introduced medical reports that had been excluded at trial—two from 2014 and one from 2017—documenting Addimando's report of Grover as her abuser. (Def.'s Pre-Sentence Mem., Exs. 2-3.)

Fourteen individuals wrote letters to the court describing injuries they had observed on Addimando during the years that she lived with Grover—including, among other things, significant bruising, black eyes, burns, and strangulation marks. (*See id*. at 148-217.)

The defense presented additional expert testimony that Addimando's inability to leave Grover was consistent with the behavior of abuse victims, who "are conflicted at times" given "the tactics of control that an abuser is using." (*E.g.*, ST. 311-13 (domestic abuse expert explaining why victims frequently "fail to avail themselves of services that are available").)

On February 5, 2020, the court denied sentencing under the DVSJA. The court acknowledged that Addimando had presented "a compelling story of abuse, with horrific allegations that include repeated, sadistic sexual violence and physical abuse, complete with pictures and eyewitnesses viewing the results of her abuse" (Decision & Order on Penal Law § 60.12 ("D&O") at 41) (emphasis added), but the trial court refused to make any "definitive finding" as to the "level of abuse the defendant endured during her life, or as to which person(s) have abused the defendant." (*Id.* at 42.) Instead, the court declared that these issues of fact—which are the key determinants for whether the DVSJA applies—would remain "undetermined." (*Id.*)

The court repeatedly cited a single conclusion in support of its decision to impose a life sentence: Addimando "had a tremendous amount of advice, assistance, support, and opportunities to escape her alleged abusive situation, and thereby avoid the decision to take the life of Christopher Grover." (*Id.* at 42; *see also id.* at 44-45 ("[B]ecause the defendant had numerous opportunities to avoid any further abuse . . . it is unknown what motive compelled the defendant."); *id.* at 46 ("[T]he defendant had numerous individuals and entities who had offered her help, as well as advice and suggestions of how to extricate herself from her alleged abusive circumstances.").)

ARGUMENT

I. THE TRIAL COURT'S DISQUALIFICATION OF DEFENSE COUNSEL BASED ON A PURPORTED CONFLICT OF INTEREST DENIED ADDIMANDO HER CONSTITUTIONAL RIGHT TO COUNSEL OF CHOICE.

As the Court of Appeals has explained, the constitutional guarantee to be represented by one's counsel of choice is "guaranteed by both the Federal and State Constitutions (U.S. Const., 6th Amdt; N.Y. Const., art 1, §6)[.]" *People* v. *Arroyave*, 49 N.Y.2d 264, 270 (1980); *see United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). Accordingly, whether counsel is appointed or privately retained, "any restriction imposed on that right will be carefully scrutinized," and the right to counsel of choice "will not yield unless confronted with some overriding

competing public interest." *Matter of Abrams*, 62 N.Y.2d 183, 196 (1984); *People* v. *Griffin*, 20 N.Y.3d 626, 630 (2013).

In considering a potential conflict of interest because of a past representation, a court must evaluate whether a defendant's constitutional right to effective—and thus un-conflicted—counsel outweighs her right to counsel of her choice. *See People* v. *Carncross*, 14 N.Y.3d 319, 327 (2010). The "presumption in favor of a client being represented by counsel of his or her choosing" may be overcome only by "an actual conflict or a serious potential for conflict." *People* v. *Watson*, 26 N.Y.3d 620, 625 (2016). Disqualification of defense counsel is reviewed for abuse of discretion, *id.* at 624, and the remedy for improper disqualification is automatic reversal and vacatur of conviction. *People* v. *Griffin*, 92 A.D.3d 1, 7 (1st Dep't 2011), *aff'd*, 20 N.Y.3d 626 (2013) ("erro[neous]" interference with right to counsel is "per se reversible"); *People* v. *Salcedo*, 68 N.Y.2d 130, 135 (1986) (vacating conviction where court improperly disqualified counsel).

The trial court's disqualification of Addimando's counsel wrongly deprived her of her constitutional right to counsel for at least four independent reasons. *First*, the entire basis of the disqualification was a purported conflict for Gerry and DCPD which did not exist. DCPD's six-year-old DWI representation of a potential trial witness, Betancourt, was not substantially related to Addimando's representation and would not have limited the ability of DCPD lawyers to cross-

examine Betancourt about his abuse of Addimando if he appeared at trial. *Second*, even if other lawyers at DCPD who represented Betancourt were conflicted, Gerry, Addimando's individual counsel, had no relationship with Betancourt, much less his prior representation, and thus had no conflict. *Third*, assuming a conflict existed—it did not—Addimando consulted with independent counsel and provided a knowing waiver which the trial court should have honored. *Finally*, the court erroneously failed to adopt less prejudicial and drastic remedies than disqualification to address any purported conflict—such as appointing conflicts counsel to cross-examine Betancourt if he testified and/or continuing to prevent Gerry's access to Betancourt's file.

A. The DCPD's Prior Representation of Cesar Betancourt Did Not Create a Conflict.

An attorney's duties of loyalty to past and present clients may be in conflict where "the former and current representations are both adverse *and substantially related*." *Solow* v. *W.R. Grace & Co.*, 83 N.Y.2d 303, 308 (1994) (emphasis added); *see also People* v. *Prescott*, 21 N.Y.3d 925, 928 (2013) (conflict existed where "successive representation concerned substantially related matters, but depended on mutually incompatible legal strategies, which undermined . . . counsel's loyalties"); Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.9(a) ("A lawyer who has formerly represented a client in a matter shall not thereafter

represent another person in the same or a substantially related matter" where the interests are "materially adverse").

A matter is substantially related to a prior representation if "the current matter involves the work the lawyer performed for the former client" or there is a "substantial risk" that the lawyer will use confidential information "acquired in the course of representing the former client" in the current representation. *United States* v. *Pizzonia*, 415 F. Supp. 2d 168, 177 (E.D.N.Y. 2006) (quoting Restatement (Third) of the Law Governing Lawyers § 132 (2000)).

Applying these principles, this Court regularly holds that a defense counsel's earlier representation of a witness on an unrelated charge does not give rise to a conflict warranting disqualification. *See, e.g.*, *People* v. *Roberts*, 251 A.D.2d 431, 432 (2d Dep't 1998) (defense counsel's previous representation of prosecution witness on "unrelated criminal charge" did not give rise to unwaivable conflict of interest). As this Court explained in *People* v. *Burks*, where "counsel had on a prior occasion represented one of the prosecution witnesses in an unrelated criminal proceeding," that unrelated matter could not give rise to "a conflict of interest or even a significant possibility thereof[.]" 192 A.D.2d 542, 542-43 (2d Dep't 1993) (rejecting ineffective assistance of counsel claim).

Burks controls here. Betancourt's six-year-old DWI charge for operating a motor vehicle while under the influence of alcohol, *see* NY Vehicle &

Traffic Law § 1192, was unrelated to the issue the court cited as the disqualifying conflict—the potential cross-examination of Betancourt on the ancillary issue of whether he had abused Addimando. Because there was no substantial relationship between DCPD's previous representation of Betancourt on the DWI charge and its current representation of Addimando, no conflict existed.[10]

B. Addimando's Counsel, Gerry, Had No Conflict.

Even assuming that Betancourt's DCPD lawyers would have a conflict representing Addimando, there was no conflict with respect to Gerry, Addimando's individual lawyer at DCPD. Courts have repeatedly held that a previous representation by a public defense organization of a potential witness in a case handled by a different attorney in that organization—the precise facts here—does not create a conflict of interest. *See People* v. *Villanueva*, 181 A.D.2d 702, 702 (2d Dep't 1992) (concluding "Legal Aid Society's prior representation of the complainant was, in and of itself, insufficient to establish a conflict of interest"); *People* v. *Pagan*, 57 Misc. 3d 486, 492-93 (N.Y. Crim. Ct. Bronx Cnty. 2017) (concluding any conflict raised by Bronx Defenders' prior representation of a

[10] Moreover, disqualification was not warranted even if DCPD had obtained confidential information in the course of its representation of Betancourt (although no evidence suggests it did). DCPD had a duty to preserve any such confidences while representing Addimando. A lawyer's "continuing duty to preserve confidentiality of information about a client formerly represented" is "[i]ndependent of the prohibition against subsequent representation." *See* Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.9 cmt. 7.

prosecution witness was not imputable to current proceeding where defense counsel lacked knowledge about prior matter).

Whether a prior representation by one attorney in the same office should be imputed to all attorneys in that office depends on whether there is "a free flow of information, so that knowledge of one member of the firm is knowledge to all." *People* v. *Wilkins*, 28 N.Y.2d 53, 56 (1971). This concern is reduced for legal services organizations like DCPD, and imputation is not the rule, because legal services lawyers lack a "financial interest in matters handled by their colleagues which might give them a motive to share confidential information," and those lawyers tend to oversee such a "large volume of cases" that information sharing is unlikely to occur. *United States* v. *Reynoso*, 6 F. Supp. 2d 269, 271 (S.D.N.Y. 1998) (declining to impute individual Federal Public Defender's conflict from prior representation to entire office).

The "frequent turnover" in public defender offices also reduces sharing of confidential information, cutting against imputing a conflict from one attorney to the entire office. *See United States* v. *Lech*, 895 F. Supp. 586, 591 (S.D.N.Y. 1995) (presumption of imputation to entire office "must be viewed flexibly" for "legal aid societies, because frequent turnover and heavy caseloads considerably reduce access to client confidences").

These general legal principles against disqualification of an entire legal services organization apply with even greater force here. At the time of the prosecution's disqualification motion, no information about Betancourt's prior DWI had been conveyed to Gerry. Gerry did not know and had never spoken to Betancourt, was not at DCPD when it represented Betancourt, had never spoken to Betancourt's DCPD lawyer about his representation, and had no access to his files. (*See* Letter from Kara M. Gerry, to Judge Edward T. McLoughlin (May 1, 2018) at 2-3.) These uncontroverted facts are indistinguishable from *Lech*, where the court held that a Legal Aid Society lawyer who lacked knowledge "of any confidences" stemming from representation of a cooperating prosecution witness was not conflicted from representing the defendant. 895 F. Supp. at 590.

Moreover, and wholly apart from the trial court's legal error, the decision, if permitted to stand, would wreak havoc with our system of public representation. The core of the court's decision—that all lawyers in a public defense organization must be disqualified if one attorney in the office previously represented a potential witness on an unrelated matter—would result in the unnecessary disqualification of defense organizations from providing representation to a substantial portion of their clients. Moreover, the court's decision would allow for an influx of tactical disqualification motions predicated upon identifying witnesses with a "conflict," characterizing the witnesses as "crucial," obtaining

disqualification, and then never calling the witnesses at trial. The court's decision is not only legally wrong—it is unworkable and should be reversed.

C. Addimando Validly Waived Any Conflict.

Even if Gerry had a conflict—she did not—and would be unable to cross-examine Betancourt if he testified, Addimando validly waived that conflict in favor of retaining Gerry, who had worked with Addimando for months, including by identifying witnesses, developing defenses, and preparing Addimando to testify before the grand jury.[11] There was no basis for the trial court's conclusion that the supposed conflict was "unwaivable" (DQO at 8), and Addimando's knowing and voluntary waiver should have been respected.

Indeed, both the prosecution and the court initially appeared to acknowledge that any informed waiver would be a solution to any conflict and should be honored. In its motion, the prosecution sought alternative relief asking the court to "obtain from defendant her informed decision" to waive any conflict. (Notice of Motion to Recuse at 2.) The court then proceeded to do exactly that, appointing independent counsel for Addimando to address the alleged conflict and holding a hearing at which the court questioned both Addimando and conflicts

[11] The prejudice to Addimando from disqualification is undeniable. Addimando's replacement counsel stated that it would take him a "minimum of a month" to get up to speed on the case upon his appointment. The prosecution similarly acknowledged the substantial amount of preparation Gerry put into the case before being disqualified, telling new counsel "you have a lot to catch up" on. (*See* HT. at 8-12, 28, 34.)

counsel about whether Addimando understood the potential "conflict" and had, nonetheless, provided a knowing and informed waiver.[12] After obtaining both Addimando's waiver and precisely the alternative relief the prosecution requested, the court disqualified Gerry nonetheless. It was error to disregard Addimando's informed and knowing waiver.

"[T]he very narrow category of cases in which . . . attorney conflicts [are] unwaivable," *United States* v. *Perez*, 325 F.3d 115, 126 (2d Cir. 2003), include only those "that implicate the attorney's self-interest," such as where the attorney is allegedly involved in the criminal conduct at issue, or has a pecuniary interest that runs contrary to that of the client. *United States* v. *Schwarz*, 283 F.3d 76, 95-96 (2d Cir. 2002).

Gerry's representation of Addimando presented no facts remotely like these. Indeed, even the worst potential consequence for Addimando from the purported conflict, as postulated by the court, was that Gerry might have to "alter" her trial strategy to avoid calling Betancourt. (DQO at 6.) Even if accurate, this

---

[12] The trial court stated that Addimando's conflicts counsel was "very experienced," and was appointed "to make sure that [Addimando] independently, from [her] other lawyer" considered a waiver. (DT. 4.) Conflicts counsel informed the court that Addimando felt Gerry was "very hard-working and supported [Addimando]" (DT. 6), and that Addimando's waiver was knowing. (DT. 7 ("I did discuss with her issues of cross-examination" and "limitations that Ms. Gerry might have . . . ."); DT. 8 ("Ms. Addimando understands what the issue is, what the possible ramifications are, both positive and negative.").) Conflicts counsel also informed the trial court that Addimando "clearly and strongly urged me to support the Public Defender's position in [sic] that there is no conflict." (DT. 5.)

consequence would not render the conflict "unwaivable." *Perez*, 325 F.3d at 127 (holding that even a conflict requiring "a defendant to abandon a particular defense or line of questioning" is *not* "unwaivable").[13]

Addimando made a perfectly acceptable and informed decision to keep her counsel of choice, even if it meant not calling a collateral trial witness (who was not called even after disqualification). *See United States* v. *Fulton*, 5 F.3d 605, 613 (2d Cir. 1993) (where a purported conflict "requires counsel to forgo specific questions in cross-examination of a witness, . . . or in the presentation of a particular defense," a defendant may "make an informed judgment" to waive); *Perez*, 325 F.3d at 127 ("lesser conflicts [than those addressed in *Perez*], such as an attorney's . . . prior representation of a trial witness, *are* generally waivable." (emphasis added)).

Where a waiver is permissible, as here, it is valid so long as the defendant has "an awareness of the potential risks involved in that course and . . . knowingly ch[ooses] it." *People* v. *Macerola*, 47 N.Y.2d 257, 263 (1979). The prosecution never disputed that Addimando's waiver was knowing. As a result,

---

[13] The claim that Betancourt was a "critical" witness for Addimando was illogical at best. The prosecution theorized that Betancourt, identified as having abused Addimando years before the shooting of Grover, was "crucial" because Betancourt would somehow support Addimando's claims of abuse. Addimando's abuse, however, was documented and never in doubt. Moreover, if Betancourt admitted abusing Addimando there was no need for Gerry to cross-examine him; if Betancourt denied the abuse, the prosecution never explained why Addimando would call him at trial only to cross-examine him about his denials that Addimando was telling the truth. As confirmed by neither side calling Betancourt, a jury determination of Addimando's guilt or innocence did not remotely turn on whatever Betancourt might say about his prior abuse of Addimando.

there was no basis for the prosecution's stated concern that, absent disqualification, any conviction could be "subject to late attack." (Reply to Affirmation in Opp'n at 7.) A defendant may not provide a knowing waiver and then claim ineffective assistance of counsel who acts in accord with the waiver. *Roberts*, 251 A.D.2d at 432 (2d Dep't 1998) (rejecting ineffective assistance claim on issue that defendant had knowingly waived); *People* v. *Paul*, 159 A.D.3d 657, 657 (1st Dep't 2018) (same), *leave to appeal denied*, 31 N.Y.3d 1120 (2018); *People* v. *Sellers*, 2 A.D.3d 654, 655 (2d Dep't 2003) (same).

D. Even Assuming an Unwaivable Conflict, the Trial Court Improperly Failed to Consider Less Drastic Alternatives than Disqualification.

Assuming contrary to law that Gerry had a conflict that could not be validly waived, the court erred by failing to consider less prejudicial alternatives to disqualifying Addimando's trusted counsel, particularly after that counsel had performed material and substantial work. "Judicial restriction . . . upon the exercise of [the] fundamental right" to "an attorney of [one's] own choosing" must "be carefully scrutinized." *People* v. *Tineo*, 64 N.Y.2d 531, 536 (1985).

One of the factors relevant to whether the court improperly restricted Addimando's "fundamental right" is "the availability of measures that might limit the dangers posed by the conflict, such as restricting an attorney's cross-examination of a former client." *United States* v. *Stein*, 410 F. Supp. 2d 316, 328 (S.D.N.Y.

2006); *see also United States* v. *Cunningham*, 672 F.2d 1064, 1073 (2d Cir. 1982) (reversing disqualification of counsel in part due to defendant's "willing[ness] to have [counsel's cross-examination of former client] limited to the matters disclosed [publicly]"); *United States* v. *Turner*, 594 F.3d 946, 954-55 (7th Cir. 2010) (remanding for new trial in light of wrongful disqualification of defense counsel in part because reasonable alternatives to disqualification were available).

Numerous less prejudicial alternatives were available here to address any potential—although illusory—prejudice to either Betancourt or Addimando. The court could, for example, have required Gerry's cross-examination concerning Betancourt's DWI conviction to be based on public information, as the Second Circuit suggested in *Cunningham*, 672 F.2d at 1073, or permitted Addimando to forgo cross-examination of Betancourt altogether, as in *Stein*, 410 F. Supp. 2d at 329, or appointed conflicts counsel to cross-examine Betancourt if he was called. The court also could have ordered that Gerry refrain from acquiring any information about Betancourt's old and unrelated representation.

The court's failure to consider any of these alternatives makes clear that it restricted Addimando's constitutional right to counsel without justification. The judgment should be reversed, and the indictment dismissed. *See People* v. *Young*, 137 Misc. 2d 400, 401 (Sup. Ct. Nassau Cty. 1987) (dismissing indictment where

criminal defendant who intended to testify before grand jury was denied right to counsel of choice); *People* v. *Estrada*, 293 A.D.2d 626, 627 (2d Dep't 2002) (same).

II. THE INTEGRITY OF THE GRAND JURY PROCESS WAS COMPROMISED BY THE PROSECUTION'S INTRODUCTION OF FALSE HEARSAY TESTIMONY.

"[W]here irregularities in presenting the case to the Grand Jury rise to the level of impairing those proceedings and creating the risk of prejudice, the indictment cannot be permitted to stand even though it is supported by legally sufficient evidence." *People* v. *Huston*, 88 N.Y.2d 400, 410 (1996). *See* NY CPL § 210.35 ("A grand jury proceeding is defective . . . when . . . the integrity thereof is impaired and prejudice to the defendant may result."). A grand jury indictment should be dismissed where "prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the Grand Jury." *Huston*, 88 N.Y.2d at 409. Although the showing required for impairment of a grand jury proceeding is "very precise and very high," the movant need not establish actual prejudice before the grand jury; indeed, a defective indictment is not cured by conviction after trial. *Id.* at 406.

Here, the integrity of the grand jury was impaired by the repeated introduction of hearsay testimony about a wipe-down of fingerprints from the gun used to shoot Grover, testimony which the prosecution knew was entirely unsupported and was false. This false hearsay testimony (i) suggested a guilty

conscience, undermining Addimando's justification defense, and (ii) cast doubt on her rendition of the events on the night of the shooting because Addimando never mentioned wiping down the gun—an act which the grand jury was falsely told had occurred. The prosecution entirely failed in its obligations to Addimando and the interests of justice by repeatedly introducing materially false testimony. *See People* v. *Lancaster*, 69 N.Y.2d 20, 26 (1986) ("[A]t a Grand Jury proceeding, the prosecutor performs the dual role of advocate and public officer . . . to see that justice is done; as a public officer he owes a duty of fair dealing to the accused and candor to the courts."); *People* v. *Jones*, 27 Misc. 3d 1208(A) (Sup. Ct. Kings Cty. 2010).[14] This wrongdoing requires dismissal of the indictment.

The facts are not in dispute. Grand jury minutes—produced to the defense "just before the start of the trial" (TT. 1418)—established that Detective Guy provided textbook hearsay testimony that "[t]hey told us that the gun was wiped down" and that "[t]hey told us that there appeared to be residue left over from it being wiped off." (GJ. 91, 94; *see supra* at 18-19.) The prosecution and the trial court agreed that this testimony never should have been provided to the grand jury.

[14] Two weeks before the grand jury, the Supreme Court ordered Addimando released from custody, finding that the prosecution had failed to seek an indictment within the time frame afforded under NY CPL § 190.80. (HT. 35-37.) The prosecution's objection to Addimando's release included its view of the case before the grand jury: "I had a full confession from the Defendant and I had a young man that was dead. This case could have proceeded to the grand jury very quickly." (HT. at 11.)

(TT. 1427 (*Court*: "Can we agree that no witness should ever be saying I heard this?" *Prosecution*: "Absolutely."); *id.* (*Prosecution*: "[A]dmittedly, it may have been improper to come out in the grand jury.").) The prosecution also admitted that neither Guy nor the prosecution ever identified anyone who supposedly told Guy that the gun had been wiped down. (*See* TT. 1757-58.)[15]

Once Detective Guy provided the false hearsay testimony, the prosecution, aware that no evidence existed that the gun had been wiped down, faced a choice: either (i) ameliorate the prejudice to Addimando and the damage to the integrity of the process by giving a corrective instruction, as it was required to do, or (ii) allow the grand jury to base an indictment on material and knowingly false hearsay testimony. The prosecution not only chose the latter, it doubled down and amplified the impropriety and prejudice by adopting the false hearsay into its questioning. Once it heard what Guy supposedly learned from some unidentified "source," the prosecution led Guy through testimony establishing that the gun had *in fact* been wiped down—not just that Guy was told so—and that it was "definitive" that baby wipes discovered near Grover were the agent used to remove fingerprints from the weapon. *See supra* at 19. The prosecution's continued questioning thus transformed Detective Guy's initial hearsay statements into authoritative false

[15] The prosecution apparently never inquired about who supposedly had told Guy the gun was wiped down until the issue was raised by the defense at trial.

evidence that Addimando—the only adult at home at the time—wiped the gun with baby wipes to remove her fingerprints. (GJ. 91, 97.)

Again, there is no dispute: Detective Guy's testimony was utterly false, and at the time the prosecution elicited that testimony, the prosecution knew, or should have known, that it was false (*e.g.*, the prosecution knew no evidence supported the testimony that "there appeared to be residue left over from it being wiped off, consistent with a cleaning solvent." (GJ. 94)). The prosecution had investigated the very issue in January 2018 in communications with the police lab and in witness depositions, even alerting Addimando's counsel that it was probing this significant issue. (TT. 1424-26.) The prosecution knew before it entered the grand jury room that no solvent test had been performed and that its investigation of this very issue had yielded not a shred of supporting evidence. Yet, the prosecution obtained an indictment based on testimony attesting to those exact falsehoods. (TT. 1179-80; *see* 1191-94, 444-45.)

The indictment must be dismissed if these "irregularities" created the risk of prejudice to Addimando, even assuming the indictment was supported by other legally sufficient evidence. *Huston*, 88 N.Y.2d at 409. The risk of prejudice from Guy's false testimony is clear. Claiming that Addimando sought to remove her fingerprints from the gun by "wiping it down" with baby wipes invited the grand jurors to conclude that Addimando possessed "consciousness of guilt," and

therefore, the shooting was not justified. *See People* v. *Bennett*, 79 N.Y.2d 464, 469 (1992) (explaining that "[c]ertain post crime conduct," such as "concealment of evidence," is "indicative of a consciousness of guilt, and hence of guilt itself"). Moreover, the grand jury heard testimony that Addimando had described the events of the shooting in detail without ever mentioning the fictitious wipe down. (GJ. 20-21.) If they accepted Guy's repeated false testimony—and there was no reason to suggest that they would not, given the prosecution's inaction—it was a simple step for the grand jurors to conclude that Addimando had lied about the events of the shooting by omitting a key detail. Addimando's credibility and state of mind was, of course, central to whether she would be indicted.

People v. *Jones*, 27 Misc. 3d 1208(A) (Sup. Ct. Kings Cty. 2010), is directly on point. In *Jones*, the defendant claimed that a stabbing was in self-defense. *Id.* at *2. After a police officer falsely testified to the grand jury that the defendant had been arrested several blocks from the scene by an officer canvassing the area—when in fact, the defendant had been arrested after walking on his own by a nearby police station—the court dismissed the indictment, reasoning that the justification defense had been undermined and the "likelihood of prejudice [was] clear and pronounced." *Id.* at *4. The *Jones* court found that the officer's false testimony: "(1) made defendant's testimony appear to be fabricated; (2) suggested that if defendant lied about key details, he might be lying about his account of the events

in toto; and (3) negated the inference that defendant was neither fleeing nor hiding." *Id.* As in *Jones*, the prosecution's presentation of hearsay and false testimony implied that Addimando was a liar who had intended to cover up her crime which directly contradicted the truth—that Addimando forthrightly and repeatedly admitted what occurred to the police and at no point engaged in evasive behavior.

The trial court rejected Addimando's motion to dismiss the indictment, but in doing so ignored the legal standard established by the Court of Appeals in *Huston*, *Lancaster* and other cases. *See, e.g.*, *Huston*, 88 N.Y.2d at 409; *Lancaster*, 69 N.Y.2d at 26; *People* v. *Pelchat*, 62 N.Y.2d 97, 106 (1984). The trial court focused exclusively on whether untainted evidence supported the indictment. (TT. 1434; Decision and Order on Mot. to Set Aside Verdict at 3.) But given the level of misconduct that occurred in the grand jury, some of it admitted by the prosecution, that was the wrong analysis. The dispositive issue was not whether other evidence existed—indeed, under these circumstances, the Court of Appeals has instructed that an indictment should be dismissed notwithstanding other sufficient evidence—but whether the proceeding had been impaired, creating a risk of prejudice. *See People* v. *Shammas*, 5 Misc. 3d 702, 707 (N.Y. Crim. Ct. 2004) (dismissing indictment where the prosecution "mischaracterized and omitted facts which were relevant to the grand jury's consideration of the defense of justification"); *People* v. *Blauvelt*, 156 A.D.3d 1333, 1335 (4th Dep't 2017) (dismissing indictment where prosecutor

introduced hearsay evidence in the grand jury); *People* v. *Gordon*, 101 A.D.3d 1473, 1477 (3d Dep't 2012) (dismissing indictment where prosecutor introduced hearsay evidence in the grand jury relating to identification of the defendant, even though legally sufficient evidence was presented at trial showing that defendant was the perpetrator).

Here, no less than four times the prosecution let Guy testify without correction or instruction about matters the prosecution knew or should have known were false, thereby undermining Addimando's defense and credibility. (TT. 1427.) Dismissal of Addimando's indictment "not only protects the defendant but also safeguards the liberty of all citizens by ensuring that improper prosecutorial influence during secret Grand Jury proceedings will not lead to unfounded prosecutions." *Huston*, 88 N.Y.2d at 406.

III. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REJECTED ADDIMANDO'S EXERCISE OF A PEREMPTORY CHALLENGE.

"Nothing is more basic to the criminal process than the right of an accused to a trial by an impartial jury." *People* v. *Neulander*, 34 N.Y.3d 110, 112 (2019). "[B]y enabling each side to exclude those jurors it believes will be most partial toward the other side," the peremptory challenge supports the goal of fairness. *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 147 (1994). Exercising a peremptory challenge is thus a "substantial right" of the accused, *People* v. *Jabot*, 93 A.D.3d

1079, 1081 (3d Dep't 2012), and such challenges are even more significant in cases involving domestic violence and sexual abuse, where there is a substantial potential for juror bias. *See Linn* v. *State*, 929 N.W.2d 717, 735 (Iowa 2019) ("[B]attered victims with characteristics and experiences considered atypical may be disbelieved because of that atypicality, and . . . jurors may judge them more harshly if they do not fit their perceptions of what a battered woman should be.").[16] Peremptory challenges allow the defendant to "exclude prospective jurors who may harbor subtle prejudices which may be sensed by counsel but which are not explicitly revealed by the prospective juror on voir dire." *People* v. *McCray*, 57 N.Y.2d 542, 545-46 (1982).

A trial court abuses its discretion by rejecting a belated peremptory challenge if the challenge causes "no discernable interference or undue delay." *People* v. *Price*, 175 A.D.3d 1436, 1437 (2d Dep't 2019) (quoting *Jabot*, 93 A.D.3d at 1081)). Under this standard, trial courts abuse their discretion by rejecting a peremptory challenge made "just moments" late where jury members have neither been notified of their selection nor sworn. *Jabot*, 93 A.D.3d at 1081; *People* v. *Parrales*, 105 A.D.3d 871, 872 (2d Dep't 2013); *see also People* v. *Scerbo*, 147 A.D.3d 1497, 1498 (4th Dep't 2017) (court abused discretion by rejecting

[16] *See State* v. *Obeta*, 796 N.W.2d 282, 294 (Minn. 2011) ("[T]he mental and physical reactions of an adult sexual-assault victim may be outside the common understanding of an average juror.").

peremptory challenge when "[t]he jury had not been sworn, the panel from which the alternatives would be selected had not yet been called, and [the prospective juror] had not yet been informed that he had been selected"). This is true even if some small amount of additional time is needed to accommodate a late challenge, for example, the time necessary to remove the contested juror from the selected panel. *See People* v. *McGrew*, 103 A.D.3d 1170, 1172-73 (4th Dep't 2013) (court abused discretion by rejecting peremptory challenge made after court had moved to the next round of potential jurors and sworn in the contested juror because there was no "discernable interference or undue delay"). Improper rejection of a peremptory challenge mandates "automatic reversal" of a criminal conviction. *People* v. *Hecker*, 15 N.Y.3d 625, 661 (2010).

Here, because the court impermissibly refused to allow Addimando to exercise a peremptory challenge, the conviction should be reversed. Minutes after prospective juror number 10 had been considered—and only shortly after the selection process began—defense counsel corrected his misunderstanding of Addimando's decision to challenge that juror. Honoring counsel's correction of his error would have caused "no discernable interference or undue delay." *Price*, 175 A.D.3d at 1437. As described above (*see supra* at 21), prospective juror 10 was in the first group of twenty selected for voir dire. Defense counsel raised the challenge just minutes late. (JS. 543-45.) This was not a change of heart or a strategic

maneuver by the defense, but simply an attempt by counsel to carry out the initial instruction of his client.

The court rejected the correction, citing potential prejudice: "[B]oth sides may have a strategy to what they like to choose, how many they have left, it can effect that process." (JS. 545.) But this did not support rejecting Addimando's challenge. Between the time juror 10 had been accepted and when counsel attempted to correct his error, only one juror, prospective juror 16, had been selected and no jurors had been sworn. *See supra* at 21. To the extent that excusing juror 10 could impact either side's decision concerning juror 16—and no evidence suggests that it did—the court could simply have reopened challenges to juror 16, which would have taken no more than a few moments out of a jury selection process that lasted for four days. (*See* JS. 1-783.) It is hard to imagine circumstances which weigh more heavily than those here in favor of permitting a belated challenge.

Given all the circumstances—the subject matter of the trial, the timing of the challenge, the clear mistake by counsel, and the fact that only one juror had been selected between consideration of the juror at issue and counsel's attempt to correct his error (and no potential jurors had been sworn)—the trial court's denial of Addimando's "substantial right" to exercise a peremptory challenge was an abuse of discretion, and the conviction, respectfully, must be reversed.

IV. THE TRIAL COURT ERRONEOUSLY EXCLUDED EVIDENCE SUPPORTING ADDIMANDO'S CREDIBILITY AND HER JUSTIFICATION DEFENSE—THE CENTRAL ISSUES AT TRIAL.

"[A] court's discretion in evidentiary rulings is circumscribed by the rules of evidence and the defendant's constitutional right to present a defense." *People* v. *Diaz*, 85 A.D.3d 1047, 1050 (2d Dep't 2011), *aff'd*, 20 N.Y.3d 569 (2013). Where a trial court improperly excludes evidence offered by a defendant, reversal is appropriate unless such error was harmless beyond a reasonable doubt. *Id*. at 1051; *People* v. *Spencer*, 20 N.Y.3d 954, 956 (2012); *see also Crane* v. *Kentucky*, 476 U.S. 683, 691 (1986).

To corroborate her allegations of abuse by Grover in support of her justification defense and counter the prosecution's contention that Addimando lied about Grover's abuse, Addimando sought to introduce screenshots of her abuse on the Pornhub website. The screenshots included information identifying Grover as the person who uploaded the photos, including the user name "Groverespect," and other personal characteristics about the internet account user that described Grover to a T. While permitting Addimando to introduce the images in the exhibits (*see* Exs. GGG-MMM, UUU-VVV), the trial court erroneously refused to admit the information linking the images to Grover on Exhibits UUU and VVV, ruling that the "Groverespect" name and the user information aptly describing Grover had not been sufficiently authenticated. After its erroneous evidentiary ruling, the court

committed a second independent error by refusing to admit the user profile connection to Grover on the photographs after the prosecution "opened the door" by eliciting testimony that the Pornhub screenshots did *not* indicate who uploaded the content. The court's ruling prevented cross-examination of the prosecution witness' misleading testimony with the identifying information that the court initially excluded.

The excluded evidence was both probative and central to Addimando's defense; it: (i) corroborated Addimando's claims that Grover caused her abuse and, consequently, supported her justification defense; (ii) contradicted the prosecution's core theory that Addimando lied; and (iii) was necessary to effective cross-examination to rebut the misleading testimony of a key prosecution witness. Because the court's erroneous exclusion of this evidence was highly prejudicial, Addimando's conviction should be reversed and a new trial ordered.

A. The Court Erred by Excluding Evidence of the *Pornhub* User Profile.

Authenticity is established by laying a "sufficient foundation . . . to *permit* a finding" that the evidence is what the proponent purports it to be. *People* v. *Lynes*, 49 N.Y.2d 286, 291 (1980) (emphasis added); *see also People* v. *Franzese*, 154 A.D.3d 706, 706 (2d Dep't 2017). Social media profiles may be authenticated as belonging to a particular person through circumstantial evidence of the profile's "distinctive characteristics" that are "sufficient to support a finding that there is a

reasonable likelihood that" the profile in question is connected to the alleged user. *People* v. *Moye*, 2016 WL 1708504, at *6-*7 (Sup. Ct. Queens Cty. 2016) (emphasis added); *People* v. *Price*, 29 N.Y.3d 472, 480 (2017) (stating that attribution of a web profile to an individual requires "sufficient evidence to establish that the web page belonged to, and was controlled by," the individual). The fact that information posted by a particular account was only known or accessible to a "limited number of people"—including the alleged account user—weighs in favor of authentication. *See United States* v. *Encarnacion-Lafontaine*, 639 F. App'x 710, 713 (2d Cir. 2016) (proper authentication where "a limited number of people . . . had information that was contained in the messages").

The authentication evidence proffered by Addimando was more than sufficient. *First*, both the account name—Groverespect—and the biographical details listed on the account matched Grover's name, age, gender, and interest in martial arts and cinematography. (TT. 770, 1852, 2020, 2110.) *Second*, Addimando testified that Grover took the pictures and posted them to a pornography site, and that Grover frequently visited such sites. (TT. 667, 844-45, 1038.) *Third*, in the pictures posted to Pornhub by "Groverespect," Addimando was bound by the wrists and naked in her own home—strong authenticating evidence that Grover, the only other adult living in the apartment, controlled the pictures and uploaded them. *Fourth*, Addimando testified that Grover "always talked about respect" (TT. 838-

41) and repeatedly demanded that she "show [him] some respect." (TT. 731, 663, 667; *see* TT. 654 ("[y]ou need to respect me.").) *Finally*, the prosecution never offered evidence that the Groverespect account belonged to anyone other than Grover, or that the pictures at issue were ever in anyone else'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").

This evidence clearly met the "reasonably likely" authentication test that Grover was the user behind the Groverespect profile. *See Encarnacion-Lafontaine*, 639 F. App'x at 713 ("evidence made it reasonably likely that" the "Facebook messages were written by" defendant). Thus, any doubts about whether Grover was "Groverespect" were for the jury to weigh, not a basis to exclude critical evidence. *See Moye*, 2016 WL 1708504 at *7 ("The defendant's argument concerning knowing exactly who typed out the message, by eyewitnesses or other evidence, does not defeat admissibility, but rather is more appropriately addressed to the weight of the evidence to be given by the fact finder.").

Rejecting this authentication evidence —sufficient as a matter of law— the court created an evidentiary requirement that would in many cases be impossible to meet. According to the trial court, only the "record keeper"—here, the Pornhub web host located in Cyprus—could provide "identifying information" and say that

"the following person signed up for this user name." (TT. 1560; *see also* TT. 2113 (requiring "a human [to] come in and say this . . . is connected to this decedent").) By rejecting legally sufficient authenticating evidence and requiring Pornhub itself to authenticate the account user's actual computer address, the trial court created erroneous law that would protect abusive and unlawful uses of websites whenever, as here, the hosting service is beyond subpoena power of the courts.

The prosecution's decision to weaponize the exclusion of the Groverespect profile in its summation confirms that, far from being harmless, the ruling severely prejudiced Addimando. In closing, the prosecution asked 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, suggesting that because Addimando could not corroborate her testimony that Grover had taken and published violent pornographic photographs of her, she made up the facts leading to the shooting and the details of the shooting itself. (TT. 2254-55; TT. 2216 ("how can you trust anything that she says about her history and about the night she killed Christopher Grover?").)

This prejudicial manipulation of the trial court's erroneous preclusion orders—as both a shield and sword—requires reversal. *See People* v. *Duplessis*, 16 A.D.3d 846, 847-48 (3d Dep't 2005) (rejecting use of preclusion ruling "as a shield during testimony and as a sword during summations . . . when [defendant] knew the

prosecution were precluded from introducing existing evidence to the contrary"); *see also People* v. *Frazier*, 6 A.D.3d 455, 456 (2d Dep't 2004) (prejudice where "excluded evidence would have corroborated" defendant's theory of justification).

B. Even If the Evidence Was Properly Excluded Initially, the Prosecution's Expert "Opened the Door" Through Misleading Expert Testimony.

Wholly independent from the original erroneous evidentiary ruling, the trial court deprived Addimando of her right to cross-examine the prosecution's expert, Dr. Stuart Kirschner, when he testified that the photos did not indicate "whose website it was." (TT. 1929.) The prosecution called Kirschner to, among other things, cast doubt on Addimando's testimony about Grover's abuse. (TT. 1943.) Kirschner testified there was no evidence of who owned the Pornhub profile and thus nothing to connect the violent and sadistic pictures to Grover or corroborate Addimando's testimony that Grover took and uploaded the photos. (*See* TT. 1929.) Because Addimando was not permitted to challenge this testimony with contrary evidence, the prosecution was then able to use it to cast doubt on Addimando's testimony that Grover abused her. Equally important, by excluding the identifying information in the Pornhub screenshots, Addimando was prevented from undermining Kirschner's credibility by demonstrating that his assertions were at least misleading, if not outright false.

Kirschner was aware of the "Groverespect" user name and corresponding biographical information associated with the Pornhub user account. (TT. 2008-11). Yet he testified that the pornographic photographs of Addimando "didn't say how it got there and whose website it was." (TT. 1928-29.) When the defense attempted to cross-examine Kirschner with the fact that the website identified the user as Groverespect, a 29-year-old male with interests similar to Grover's, the trial court sustained the prosecution's objection, leaving the jury with the improper impression that Kirschner's testimony that the photos had no identifying information was accurate. (TT. 2008-11.)

New York courts have repeatedly held that a defendant may introduce otherwise inadmissible evidence to "cure a misleading impression created" by testimony elicited by the opposing party. *See, e.g.*, *People* v. *Givens*, 271 A.D.2d 372, 372 (1st Dep't 2000) (allowing prosecution to present evidence to cure misimpression caused by defendant's testimony); *see also People* v. *Torre*, 42 N.Y.2d 1036, 1037 (1977) (vacating conviction due to improper denial of evidence on cross-examination that "bore upon the question of justification . . . the primary issue in this case"). Where, as here, a party or witness "testifies to facts that are in conflict with the precluded evidence . . . [this] 'opens the door' on the issue in question, and the witness is properly subject to impeachment" by the previously inadmissible evidence. *People* v. *Fardan*, 82 N.Y.2d 638, 646 (1993).

Addimando's inability to cross-examine Kirschner with the Pornhub evidence frustrated her constitutional right to present a defense and to confront the witnesses. "The right to present a defense is one of the 'minimum essentials of a fair trial[.]'" *People* v. *Gibian*, 76 A.D.3d 583, 585 (2d Dep't 2010) (quoting *Chambers* v. *Mississippi*, 410 U.S. 284, 294 (1973)). That right, grounded in both the due process protections of the Fourteenth Amendment and the Confrontation Clause of the Sixth Amendment, guarantees "the opportunity to present relevant, reliable, materially significant evidence." *Matter of People* v. *Juarez*, 31 N.Y.3d 1186, 1199-1200 (2018); *see also Matter of Kitchen*, 706 F.2d 1266, 1273 (2d Cir. 1983) ("Full cross-examination . . . is an essential element of both the right to present defenses and the right to confront the government's evidence."). Relatedly, the Confrontation Clause ensures a defendant's right to engage in "otherwise appropriate cross-examination designed . . . to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." *Id.* (quoting *Delaware* v. *Van Arsdall*, 475 U.S. 673, 680 (1986)). Addimando's cross-examination of Kirschner regarding his misleading statements about the Pornhub evidence was critical to her defense because it would have allowed Addimando to test "the truth of the witness's direct testimony." *Nappi* v. *Yelich*, 793 F.3d 246, 251-52 (2d Cir. 2015) (quoting *Dunbar* v. *Harris*, 612 F.2d 690, 693 (2d Cir. 1979)).

By denying Addimando the right to fully cross-examine Kirschner's testimony that Addimando falsely portrayed Grover as abusing her and challenging his credibility, the court impeded the jury's "truthfinding process," hindering Addimando's ability to assert an effective defense. *See Howard* v. *Walker*, 406 F.3d 114, 130 (2d Cir. 2005) ("trial court's limitation" on appellant's cross-examination "was particularly harmful to the truthfinding process"); *see also People* v. *Bradley*, 99 A.D.3d 934, 937 (2d Dep't 2012) (although a "trial court may preclude impeachment evidence that is speculative, remote, or collateral, '[that] rule . . . has no application where the issue to which the evidence relates is material in the sense that it is relevant to the very issues that the [trier of fact] must decide.'" (quoting *People* v. *Knight*, 80 N.Y.2d 845, 847 (1992))).

Because the court's error in refusing to allow Addimando to confront Kirschner deprived Addimando of her constitutional rights, it requires reversal of Addimando's conviction unless "it was harmless beyond a reasonable doubt." *People* v. *Crimmins*, 36 N.Y.2d 230, 243 (1975). There can be no doubt that, for all of the reasons stated above, the trial court's refusal to permit full cross-examination of Kirschner was not harmless error. Therefore, the conviction should be reversed, and a new trial ordered.

V. THE TRIAL COURT FAILED TO FOLLOW THE EXPRESS STATUTORY COMMANDS OF PENAL LAW § 60.12, THE DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT. THIS COURT SHOULD IMPOSE ITS OWN SENTENCE OR REMAND TO A DIFFERENT JUDGE FOR A NEW HEARING.

The lower court's decision that Addimando was not entitled to a lesser sentence provided by the DVSJA disregarded plain statutory language and legislative intent; indeed, it is hard to fathom who would merit relief under the DVSJA if not Addimando. Enacted just weeks after Addimando's conviction, the DVSJA applies to the circumstances present here—a victim of domestic abuse is unsuccessful in asserting a justification defense, but nonetheless shows that the abuse played a significant role in the behavior leading to a conviction. *See* Sponsor's Mem., 2019 S.B. A03974 (the DVSJA intended to address the "unjust ways in which the criminal justice system responds to and punishes domestic violence survivors who act to protect themselves from an abuser's violence").

The DVSJA provides a three-part test to determine whether a defendant is eligible for a reduced sentence: (i) at the time of the charged offense, defendant was a "victim of domestic violence and subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household"; (ii) the abuse was "a significant contributing factor" to the criminal behavior; and (iii) "having regard for the nature and circumstances of the crime and the history,

character and condition of the defendant," a sentence under current law would be "unduly harsh." NY Penal Law § 60.12(1).

Rather than determine whether Addimando met the statutory criteria, the trial court expressly declined to decide the severity of the abuse suffered by Addimando, or at whose hands. Instead, the court rejected a reduced sentence because of Addimando's purported "uncontroverted ability to withdraw from her apartment" rather than shoot Grover. (D&O at 42, 45.) In so doing, the court not only failed to determine whether Addimando was eligible for relief under the elements of the statute, but also improperly required that a defendant prove that retreat was not physically possible. By imposing its own standard contrary to the legislative text, the court created an illogical tautology—to be eligible for a reduced sentence for criminal conduct, Addimando must show justification, thereby not committing a crime in the first place.

This Court reviews the trial court's interpretation of the law de novo, *see* NY CPL § 470.15(1), and may also exercise its "discretion in the interest of justice" to reduce Addimando's sentence consistent with the DVSJA. *Id*. at § 470.15(6)(b). In the alternative, her case should be remanded to a different judge with appropriate instructions for resentencing. *See People* v. *LaSalle*, 95 N.Y.2d 827, 829 (2000) (appellate court may "substitute its own legal sentence for the illegally imposed sentence" or remit for resentencing).

A. By Refusing to Determine the Severity of the Abuse or the Identity of the Abuser, the Court Failed to Decide Whether Addimando Met the Requirements of the Statute.

Although, in the court's own words, Addimando had presented "a compelling story of abuse," the court expressly made "no definitive finding regarding the abuse of the defendant," either as to "the severity of the abuse" or the "identity of the abuser(s)." (D&O at 41, 46.) Contradicting its earlier observations about Addimando's showing, the court repeated no less than five times that Addimando's abuse was "undetermined" or "not clear." (*Id.* at 44 (referring to Addimando's "undetermined abuse history"); *id.* at 45 (noting the "undetermined details of the abuse and the abuser" and "undetermined abuse history"); *id.* at 42 (the "Court makes no definitive finding as to the level of abuse the defendant endured during her life, or as to which person(s) have abused the defendant"); *id.* at 44 (it is "not clear whether the alleged abuse was carried out by Christopher Grover in part or in whole, and to what degree").) By refusing to determine what the statute requires, specifically, whether Addimando was subjected to substantial abuse by a member of "the same family or household," the court abdicated its duty to apply the

DVSJA as written by the legislature.[17] NY Penal Law § 60.12(1).

Similarly, under the second and third prongs of the DVSJA, the trial court was required to determine whether Addimando's abuse was a "significant contributing factor" to her behavior, and whether the "nature and circumstances" of the crime and the defendant's "history, character and condition" would render an ordinary sentence "unduly harsh." The court never made any findings about whether these requirements set by the legislature had been met, instead declining to apply the statute because the court believed that Addimando could have escaped Grover rather than shoot him.

B. The Court Contravened the Plain Text and Purpose of the DVSJA by Illogically Requiring that Sentencing Relief Be Conditioned on the Crime Never Having Occurred.

The court further erred in its analysis of the second and third requirements of the DVSJA by conflating the statutory standard for sentencing reduction with the showing required to establish justification, specifically whether

[17] As for who had abused Addimando, the trial court erroneously focused exclusively on whether it was Grover (although, as discussed *supra* at 28 and above, it did not decide the issue). Addimando, however, was eligible for DVSJA relief regardless of whether the abuse was committed by Grover, provided that her abuser was a member of Addimando's "household." Under the DVSJA, which incorporates the definition contained in NY CPL 530.11, "household" includes "persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time." *Id.* The court made no determination as to whether the abuse had been carried out by a member of the "household" as required, particularly in light of the court's refusal to decide whether the abuse had been carried out by Grover. The prosecution did not contend that Addimando's abuser did not meet the "household" definition.

the defendant was obliged to retreat instead of using deadly force. In other words, in the court's view, Addimando could only be eligible for a reduced sentence if she was justified in shooting Grover because she could not safely retreat (D&O at 43), and thus was not guilty of a crime in the first place. These are not the conditions set by the legislature in the DVSJA.

It is plain that the prerequisites for justification leading to acquittal and those for DVSJA sentencing relief are not the same. A person who kills another person is justified, and thus not guilty of murder, if she "reasonably believes that such other person is using or about to use deadly physical force" and that she cannot safely retreat. NY Penal Law § 35.15(2)(a); *People* v. *Hernandez*, 98 N.Y.2d 175, 180 (2002). The DVSJA, in contrast, applies "regardless of whether the defendant raised a [justification defense]." N.Y. Penal Law § 60.12(1). Indeed, the DVSJA as a whole was intended to apply in those situations where "the existing defenses of duress or justification do not adequately address the issues raised." N.Y. City Bar Ass'n, *Report in Support of the Domestic Violence Survivors Justice Act* 3 (2019), https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/report-in-support-of-the-domestic-violence-survivors-justice-act; *see also Gair* v. *Peck*, 6 N.Y.2d 97, 118 (1959) (finding conclusions NY City Bar Association "persuasive authority, and [] entitled to great weight").

In addition to plain language and legislative history, basic principles of statutory interpretation confirm that application of the DVSJA does not depend on proving self-defense. It is a "well-established rule that courts should not interpret a statute in a manner that would render it meaningless." *Suarez* v. *Williams*, 26 N.Y.3d 440, 451 (2015). Reserving the DVSJA's sentencing reduction for only defendants who had no opportunity to withdraw—and thereby were legally justified—does just that. The trial court's standard "nullif[ies] . . . the very benefit which [the statute] bestows," a result "clearly not intended by the legislature." *Indus. Com'r* v. *Five Corners Tavern, Inc.*, 47 N.Y.2d 639, 646 (1979).[18]

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

Addimando's sentence should be vacated in light of the court's failure to apply the DVSJA requirements. Indeed, standing alone, the trial court's decision to make "no definitive finding" regarding who abused Addimando and how severely

[18] The trial court's questioning why Addimando did not "extricate herself from her alleged abusive circumstances" despite the "help and services" offered to her, and its reliance on these factors to refuse a reduced sentence, ignores the reality of domestic abuse for many of its victims who are unable to take advantage of what others may view as opportunities for escape. *See* Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay*, 28 COLORADO LAW 10 (1999); *see also People* v. *Ellis*, 170 Misc. 2d 945, 951 (Sup. Ct. N.Y. Cty. 1996) (describing "'[l]earned helplessness', the feeling of no escape" experienced by battered women). In concluding that Addimando could have left at any time, the court relied on perhaps the greatest misconception concerning the nature of domestic abuse. *See State* v. *Kelly*, 97 N.J. 178, 205 (1984) (noting one of the "common myths . . . is that battered [women] are free to leave"). The trial court likewise ignored that it was Addimando's suggestion that they separate that led to Grover's violent attacks and threats to kill Addimando on the night at issue.

(D&O at 46)—and thus, to leave undetermined whether Addimando was the victim of "substantial . . . abuse" by a "member of the same . . . household"—requires vacatur. *See People* v. *Colon*, 173 A.D.3d 1255, 1257 (3d Dep't 2019) (vacating sentence where record did not "conclusively establish that [the trial court] reached a determination . . . regarding defendant's eligibility" for sentencing reduction under the youthful offender statute); *People* v. *Middlebrooks*, 25 N.Y.3d 516, 527 (2015) (vacating sentence because trial court failed to decide each eligibility "factor[]" for youthful offender status). The trial court's legally erroneous determination that Addimando failed to satisfy the other two prongs of the DVSJA because she could have safely withdrawn likewise mandates vacatur. *See People* v. *Thiessen*, 76 N.Y.2d 816, 818 n.* (1990) (vacating sentence because court "applied an incorrect legal standard"); *People* v. *Mosley*, 88 A.D.2d 520 (1st Dep't 1982) (vacating sentence where trial court incorrectly applied youthful offender statute).

Finally, vacatur of the court's sentence is required because the trial court's decision was against the weight of the evidence. *See, e.g.*, *People* v. *Snyder*, 175 A.D.3d 1331, 1333 (2d Dep't 2019) (granting sentencing reduction under Sex Offender Registration Act because defendant established basis for relief by preponderance of evidence). Regarding the first requirement of the statute, at both trial and sentencing, Addimando presented "compelling" evidence that she was sexually violated, gagged, whipped, strangled and burned (*see* D&O at 41),

including her own testimony and that of her nurses, therapists and others who not only documented the torture, but also recorded that Addimando had identified Grover as her abuser. *See supra* at 10-11, 25. The allegations were further corroborated by photographs that depicted Addimando's gruesome injuries, including images uploaded to a pornographic website showing Addimando being abused, gagged and choked. *See supra* at 8-11.

The evidence not only established horrific abuse by Grover, but the evidence is consistent solely with that conclusion. The *only* person Addimando lived with during the period of her abuse detailed at trial was Grover. And there was not a shred of evidence that Grover took any action in light of the obvious physical manifestations of abuse that Grover must have observed: no questions raised; no contact of law enforcement; and no request for assistance by a healthcare provider. In short, Grover did not take the actions that any person would have taken if he was not the source of the violent abuse. There was overwhelming evidence of abuse at Grover's hands and there was not a shred of evidence that anyone other than Grover caused Addimando's horrific injuries.

There also is no doubt that the abuse, including that which took place on the night of the shooting, was a "significant contributing factor" to the underlying offense. After Addimando begged Grover to let her leave with their children, Grover sexually abused her, forced her to watch him load a gun, and twice threatened to kill

her, at one point showing her "diagrams of the brain" on his phone where he would shoot her in a fake suicide and lamenting that shooting her in the shower would produce too much "echo." *See supra* at 12-13. In the final moments, Grover made another threat: "I'm going to kill you, I'm going to kill myself, and then your kids have no one." *See supra* at 13. Upon hearing those words, and scarred from years of physical and emotional abuse, Addimando lunged toward Grover and pulled the trigger. *Id*. The sole motive for the shooting—and the sole reason for the "otherwise . . . law abiding" Addimando to have committed the act (D&O at 45)—is the abuse that she suffered at Grover's hands.[19]

Finally, "having regard for the nature and circumstances of the crime and the history, character and condition of the defendant," the 19 years to life sentence imposed was "unduly harsh." Addimando had "no criminal history and had otherwise lived a law-abiding life as a mother and partner" (*id.*), a significant consideration for whether an unreduced sentence would be "unduly harsh." *See People* v. *Clarke*, 286 A.D.2d 208, 210 (1st Dep't 2001) (felony murder sentence unduly harsh where "this [was] Defendant's first offense, and indeed, his first

[19] The fact that Addimando's abuse was a significant contributing factor to the offenses for which she was convicted does not depend on acceptance of Addimando's testimony regarding the events on the night of the shooting. There was uncontested evidence of a history of abuse, expert testimony about the impact of that abuse on Addimando, and nothing to support the prosecution's theory that the shooting occurred because Addimando, by all accounts a loving mother of two young children without any criminal history, would murder in cold blood her domestic partner of many years, the father of her children, because she feared someone would conclude that she had told a lie about Grover abusing her and consequently deny her custody of her children.

arrest"); *People* v. *Kuramura*, 148 A.D.2d 331, 331 (1st Dep't 1989) (sentence unduly harsh where defendant had no prior arrests or convictions). The court recognized that there was nothing about the "history, character or condition of [Addimando] that would make her otherwise ineligible for consideration" under the DVSJA. (D&O at 45.)

As to the circumstances of the crime, even though the jury concluded (based on a trial record marred by incorrect evidentiary rulings) that Addimando was not justified, Grover's repeated death threats to kill her and her children as well as his loading and raising a gun at Addimando render the current sentence too harsh. *See People* v. *Fernandez*, 84 A.D.3d 661, 664 (1st Dep't 2011) (sentence for second-degree manslaughter was "unduly harsh" where the defendant had "acted out of terror" in killing the victim, and had also "lived a productive, crime-free life caring for and providing support for his elderly and infirm mother, as well as his four children").

Given this record, Addimando should be sentenced to a reduced term permitted by the DVSJA. *See LaSalle*, 95 N.Y.2d at 829 (appellate court may "substitute its own legal sentence for the illegally imposed sentence"). With the full record before it, including all of the papers relied on by the trial court in its sentencing decision, there is no need to remit for further proceedings. *Contrast*

Colon, 173 A.D.3d at 1257 (remitting where the record did not contain enough information for the appellate court to reach a determination).

The DVSJA provides a sentencing range of five to fifteen years, with five years' post-release supervision for murder in the second degree. *See* NY Penal Law § 60.12(2)(b). Taking into account the factors described above, including the extensive abuse suffered by Addimando, the circumstances of the crime, her lack of criminal record, and her two young children, Addimando respectfully requests a sentence of five years, with a concomitant reduced sentence on the weapon possession count.

If this Court declines to impose its own sentence, Addimando respectfully requests that—in light of, among other things, a pattern of erroneous evidentiary and other rulings against her—remand for resentencing be to a different judge. Remand to a different judge is required where prior proceedings evince the appearance of bias or partiality. *See, e.g.*, *People* v. *Schrader*, 23 A.D.3d 585, 585 (2d Dep't 2005) (remanding for resentencing before a different judge where "sentencing court's remarks demonstrated that it improperly considered" certain evidence); *People* v. *Errington*, 307 A.D.2d 325, 325 (2d Dep't 2003) (same); *People* v. *Reeder*, 298 A.D.2d 468, 468 (2d Dep't 2002); *People* v. *McFarland*, 46 A.D.2d 616, 616 (1st Dep't 1974) ("To avoid any implication that the judge may be persuaded by the [prosecution's] prior recommendation, such resentencing should

be by a different judge"); *People* v. *Jenkins*, 84 A.D.3d 1403, 1408 (2d Dep't 2011) ("Since the Hearing Justice evinced a predisposition to reject or discredit the defendant's evidence . . . the hearing shall be held before a different justice."); *People* v. *Nieves*, 102 A.D.3d 478, 478 (1st Dep't 2013) (remanding to different judge for resentencing).

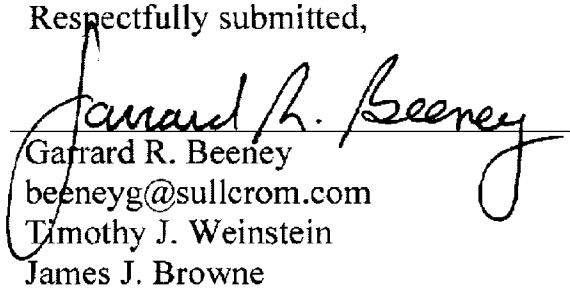
Here, the trial court repeatedly ruled against Addimando in favor of the prosecution. Moreover, the court's: (i) faulting Addimando for not fleeing on the night of the shooting—after being raped and otherwise physically abused as a result of her suggestion of a separation—and leaving her two children alone with Grover after he threatened to kill her and himself (*see supra* at 13); (ii) declaring that Grover's "demeanor and behavior" suggested that he was not Addimando's abuser (D&O at 42); and (iii) remarks during sentencing directed at Addimando (*e.g.*, Feb. 11, 2020 Hr'g Tr. at 40 ("You've taken [Grover's] future, his future as a son, a father, a brother and a friend, . . . The Grover family has to go to the grave site [to visit him]")) create at least the appearance of a hostility to Addimando, the DVSJA and the legislative intent behind the statute.

CONCLUSION

Nicole Addimando suffered years of trauma due to the physical, sexual and psychological torture by her domestic partner. She was then erroneously deprived of her counsel, indicted in an unfair process infected by false testimony, and refused the right to raise a peremptory challenge to a prospective juror. Each of these deprivations of Addimando's rights is entirely independent of what happened on the night of September 28, 2017. Addimando's subsequent criminal conviction for the shooting that night was marred by erroneous evidentiary rulings, which deprived Addimando of her right to present a defense and confront witnesses testifying against her. Finally, she was unfairly denied a reduced sentence because of the trial court's imposition of its view, rather than that of the legislators, of the scourge and impact of domestic violence. Addimando respectfully requests dismissal of the indictment or, in the alternative, a new trial or re-sentencing.

Date: July 30, 2020

Respectfully submitted,



Garrard R. Beeney
beeneyg@sullcrom.com
Timothy J. Weinstein
James J. Browne
Sullivan & Cromwell LLP
125 Broad Street
New York, New York 10004
(212) 558-4000

Amanda F. Davidoff
Kamil R. Shields
Alexander M. Self
Jennifer B. Lee
Sullivan & Cromwell LLP
1700 New York Avenue, NW
Washington D.C. 20006
(202) 956-7500

Attorneys for Defendant-Appellant

PRINTING SPECIFICATIONS STATEMENT
PURSUANT TO 22 NYCRR § 1250.8(J)

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface:	Times New Roman
Point size:	14
Line spacing:	Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, printing specifications statement, or any authorized addendum containing statutes, rules, regulations, etc., is 17,037.

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION SECOND DEPARTMENT

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

STATEMENT PURSUANT TO CPLR 5531

1. The Indictment Number in the trial court was 74/2018. The pre-indictment Index Number in the trial court was 2018/1166.

2. The full names of the parties are set forth above. There have been no changes to the caption.

3. This action was commenced in County Court, Dutchess County.

4. This action was commenced by the filing of an indictment on June 20, 2018.

5. This appeal is from a judgment convicting appellant, upon a jury verdict, of Murder in the Second Degree and Criminal Possession of a Weapon in the Second Degree (McLoughlin, J.).

6. This is an appeal from a judgment of conviction rendered on April 12, 2019, sentence rendered on February 11, 2020, and from each and every intermediate order made therein.

7. Appellant is appealing on the original record, which is permitted under 22 CRR-NY 1250.5(e)(7).