STATE OF NEW YORK
ERIE COUNTY SUPREME COURT

THE PEOPLE OF THE STATE OF
NEW YORK

v.

[redacted]

NOTICE OF MOTION TO SET ASIDE THE VERDICT
IND-[redacted]

YOUR HONOR:

Please take notice that upon the attached affirmation of [redacted], ESQ., the defendant will move at a term of Erie County Supreme Court, Part 23, at 2:00 p.m. on [redacted] or as soon thereafter as counsel can be heard, to set aside the verdict pursuant to CPL 330.30(1).

July __, 2023

Respectfully yours,

[redacted]
112 Franklin Street
Buffalo, New York 14202
[redacted]

TO:

Hon. Debra Givens

Erie County District Attorney
25 Delaware Avenue
Buffalo, New York 14202

STATE OF NEW YORK
ERIE COUNTY SUPREME COURT

THE PEOPLE OF THE STATE OF
NEW YORK

v. **SUPPORTING AFFIRMATION**
IND[redacted]

[redacted]

STATE OF NEW YORK)
COUNTY OF ERIE) ss.
CITY OF BUFFALO)

[redacted], ESQ., an attorney licensed to practice law in this State, affirms the truth of the following statements under penalties of perjury.

1. Along with co-counsel [redacted]., I am the attorney for the defendant.
2. I make this affirmation in support of my motion to set aside the verdict pursuant to CPL 330.30(1). Unless otherwise stated, this affirmation is made upon personal knowledge, the sources of which are (i) my recollection of the proceedings and (ii) my review of the relevant transcripts and the Court's decision.
3. On [redacted], following a weeklong jury trial, the defendant was found guilty as charged of criminal possession of a weapon in the second degree (Penal Law § 265.03[3]). But the conviction was secured, in important part, by a violation of the defendant's right to confront the witnesses against him. Because it cannot survive an appeal, the guilty verdict must be set aside.
4. "At any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon

... [a]ny ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would requires a reversal or modification of the judgment as a matter of law by an appellate court" (CPL 330.30[1]).

5. The prosecution's key witness was [redacted], who testified that he saw the defendant pull a gun on his girlfriend, [redacted]. [redacted] credibility was a key issue in the trial, and no other witness corroborated his testimony.

6. [redacted] did not testify. However, in response to questioning, she told the police that she saw an object that looked like a gun in the defendant's hand.

7. During the cross-examination of PO [redacted], I made reference to [redacted]s statement. On redirect examination, over my objection, the prosecutor read [redacted]s out-of-court statement into the record, and [redacted] confirmed that it was accurate. The theory behind the admissibility of this statement is that I had "opened the door" by referencing the statement on cross.

8. The defense moved for a mistrial on the ground that the admission of [redacted] statement violated the Confrontation Clause, causing prejudice to the defendant and depriving him of a fair trial. The Court denied the motion under the "opening the door" theory. That decision was reversible error.

9. "A party may 'open the door' to the introduction by an opposing party of evidence that would otherwise be inadmissible when in argument, cross-examination of a witness, or other presentation of evidence the party has given an incomplete and misleading impression on an issue. *In a criminal case, however, unconfronted testimonial hearsay is not admissible in response to a party's argument, cross-examination of a witness, or other*

presentation of evidence that is misleading" (Guide to NY Evidence, rule 4.08[1], "Opening the Door" to Evidence, emphasis added).

10. The latter part of this rule is derived from the Confrontation Clause, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to ... be confronted with the witnesses against him" (US Const Amend VI). In *Hemphill v. New York*, the Supreme Court of the United States reversed a murder conviction on the ground that the admission of unconfronted testimonial hearsay – admitted under New York's "opening the door" rule – violated the Confrontation Clause (142 S.Ct 681, 694 [2022]).

11. Although we dispute that the door was opened on cross-examination, there is no need to litigate that issue, because the admission of [redacted]s statement was a *Hemphill* violation.

12. There is no question that [redacted] statement was testimonial, as "the primary purpose of the interrogation [was] to establish or prove past events potentially relevant to later criminal prosecution" (*Davis v. Washington*, 547 US 813, 822 [2006]). For confrontation purposes, the Supreme Court has defined interrogation as "structured police questioning" (*Crawford v. Washington*, 541 US 36, n 4 [2004]).

13. The Court found, correctly, that [redacted] statement was hearsay, offered for the truth of the matter asserted therein. To the extent that the prosecution argues that the statement was admissible for a non-hearsay purpose, the motion cannot be denied on that basis. A 330.30 motion is an appellate substitute, and a conviction cannot be upheld on any ground that was not decided adversely to the defendant (CPL 470.15[1]; *People v. Concepcion*, 17 NY3d 192, 196 [2011]).

14. The defendant's memorandum of law, submitted in support of our motion for a mistrial, cited *Hemphill* and made this same argument. But the Court's decision was written as if *Hemphill* did not exist. It cited pre-*Hemphill* decisions that are no longer good law when applied to unconfronted testimonial hearsay.

15. A proper application of *Hemphill* precluded the admission of [redacted] statement, so the Court's decision to the contrary was error. The only question remaining is whether the error was harmless.

16. "Confrontation Clause violations are subject to a constitutional harmless error analysis. Constitutional error requires reversal unless the error's impact was harmless beyond a reasonable doubt ... however overwhelming may be the quantum and nature of other proof, the error is not harmless if there is a reasonable possibility that the error might have contributed to the conviction" (*People v. Hardy*, 4 NY3d 192, 198 [2005]).

17. In spite of the differences between [redacted] statement and [redacted] testimony, [redacted] put the gun in the defendant's hand, and "it is reasonably possible that the admission of this powerful, crucial corroborating evidence influenced the factfinder adversely to the defendant" (*People v. Lewis*, 208 AD3d 595, 602 [2nd Dept. 2022]). The error was not harmless.

For the reasons stated, the motion should be granted.

[redacted]