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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 63

PABLO PASTRANA,

Appellant.

20 Eagle Street
Albany, New York
September 13, 2023

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: And the first matter on the
2 calendar is Number 63, People v. Pastrana.

3 MR. ZENO: I'd like to reserve three minutes for
4 rebuttal, please.

5 CHIEF JUDGE WILSON: Yes, sir.

6 MR. ZENO: Good afternoon. May it please the
7 court, my name is Mark Zeno, and I represent appellant,
8 Pablo Pastrana.

9 I recognize that the appeals this afternoon have
10 been scheduled because they each present Second Amendment
11 challenges. But I'd like to begin my argument by
12 addressing the two important issues presented only by Mr.
13 Pastrana's appeal.

14 Both Mr. Pastrana's challenge to the roadblock
15 stop on his way home to the Bronx after celebrating at the
16 Puerto Rican Day parade and to the search of the locked
17 glove compartment in his car, based solely on the smell of
18 marijuana, are linked by the common thread of the over-
19 policing of black and brown communities that led to the
20 sweeping reforms enacted by the Marijuana Regulation and
21 Taxation Act.

22 Let me begin by briefly addressing Mr. Pastrana's
23 challenge to the roadblock stop.

24 JUDGE RIVERA: Let - - - let me ask you. So what
25 - - - what are you arguing should have been the - - - the

1 testimony, the evidence, submitted on the question of
2 whether or not that was a proper roadblock given our
3 standard? What else should've been said? What else
4 should've been presented to the court?

5 MR. ZENO: There should've been evidence before
6 the court as to who had authorized the roadblock stop and
7 for what purpose it had been authorized. The requirement
8 that - - - that a suspicion-less roadblock stop be
9 authorized at the command level or at the programmatic
10 level is intended to protect a core protection of the
11 Fourth Amendment and that is arbitrary --

12 JUDGE RIVERA: Did they need that in writing?
13 Did they need a written policy? Did they need just
14 testimony?

15 MR. ZENO: They would not necessarily need it in
16 writing. The People could've proven it through testimony;
17 perhaps even through the testimony of - - - of Det. Veit,
18 their wit - - - their sole witness, if he had had that
19 information. We don't know whether he had that
20 information. We don't know whether it was in fact
21 authorized at the programmatic levels.

22 JUDGE HALLIGAN: Where - - - where in our cases
23 or the U.S. Supreme Court's cases do you see a requirement
24 that authorization be attested to, as opposed to that being
25 probative of whether it was a permissible roadblock?

1 MR. ZENO: Well, I don't see - - - I cannot point
2 to one sentence in a - - - in this court's jurisprudence or
3 the Supreme Court. But what - - - what animates the law on
4 suspicion-less stops - - - and that - - - and suspicion-
5 less searches - - - including inventory searches, including
6 roadblocks - - - is that officers in the field can't be
7 making these decisions. That's the arbitrary police action
8 that the Fourth Amendment is designed to protect against.

9 JUDGE SINGAS: So if there's a supervisor that
10 testified, or there's evidence about a supervisor's
11 directive, then the People are okay for a prima facie
12 showing?

13 MR. ZENO: If they - - - it - - - it depends on
14 what the supervisor says. If the supervisor says, my
15 commanding officer authorized a checkpoint at this time,
16 place, and loc - - - and on - - - on this date for the
17 purpose of checking vehicle registrations. His name is so-
18 and-so - - - and then he told us we needed to stop every
19 third car, that we needed to put up a sign saying, you
20 know, checkpoint ahead. And if there was testimony from a
21 supervising officer, even if it was a supervising officer
22 on the scene, even if it was a - - - a line officer,
23 wouldn't even need to be a supervising officer - - -

24 JUDGE HALLIGAN: So - - - so I think - - -
25 correct me if I - - - if I am misrecalling the record - - -

1 that the Ofc. Veit testified that another officer, Ofc.
2 Rosario, assigned him to the checkpoint. And he also
3 explained his understanding of the procedure. So why
4 wasn't that sufficient in your view?

5 MR. ZENO: I'm not sure I recall the - - - the
6 first phrase, whether he - - - that he was assigned by Ofc.
7 Rosario. And - - -

8 JUDGE HALLIGAN: If that is a correct
9 recollection of the record - - -

10 MR. ZENO: That is a cor - - - correct
11 recollection. If Rosario is not a line officer, if Rosario
12 is a supervising officer, someone detached from the scene -
13 - - it can't be authorized by people on the scene. That's
14 the bottom-line rule that I'm talking about here. I mean,
15 that's what the Fourth Amendment is protecting against,
16 officers making decisions on suspicion - - - suspicion-less
17 stops on the scene of a roadblock, choosing, this looks
18 like a good place; let's do it here. That needs to be done
19 at the command level.

20 And in fact, the patrol guide requires that here.
21 The patrol guide requires a commanding officer to make
22 these decisions.

23 JUDGE CANNATARO: So would the - - - would the
24 requirement also include some sort of methodology for how
25 you do the search at the checkpoint? You know, every

1 fourth car, or - - -

2 MR. ZENO: Yes.

3 JUDGE CANNATARO: - - - something like that?

4 MR. ZENO: Oh, sure. It would - - - it would
5 absolutely require that. Then it would require what they
6 were checking for. I mean, if you look closely at Ofc.
7 Veit's testimony, his testimony about what they were
8 checking for evolved. He started out by saying it was a
9 vehicle safety checkpoint where they were che - - - looking
10 at cars, looking at tires. And then it became they were
11 checking registrations. They were checking seatbelts.
12 Then it became, well, maybe we were checking - - - if it
13 came to our attention that someone was drinking or
14 intoxicated - - -

15 CHIEF JUDGE WILSON: But - - - but these - - -
16 these safeguards seem to - - - sorry, over here - - - seem
17 to - - -

18 MR. ZENO: Sorry.

19 CHIEF JUDGE WILSON: - - - skirt an issue a
20 little bit, which is, suppose all of those things had been
21 laid out ahead of time - - - how many cars it is, where the
22 checkpoint was going to be, it's administratively approved
23 - - - but it's only the Puerto Rican Day parade where these
24 checks occur?

25 I mean, the - - - I'm not sure that the

1 safeguards that you're talking about actually address, you
2 know, at - - - at least the suspicion you seem to start
3 your argument with, which is - - - I mean, suppose that - -
4 - you want to be able to check people to make sure they're
5 not driving drunk. Right? That's a serious problem.
6 People - - - innocent people are killed, pedestrians are
7 killed, people - - - you know, right? So that - - - that's
8 a reasonable thing to want to do. And people who go to
9 parades drink. Some - - - some of them drive after
10 drinking.

11 But wouldn't you have a very different view if it
12 was only the Puerto Rican Day parade after which - - - or
13 the Dominican Day parade after which these checkpoints are
14 put - - - being put up, even if all the procedural
15 safeguards are in place?

16 MR. ZENO: I - - - I certainly do have that
17 concern. And that's - - -

18 CHIEF JUDGE WILSON: Well, so how do you address
19 that?

20 MR. ZENO: How do you address that? If that's
21 where - - - if you're looking at - - - if you have evidence
22 about the programmatic level authorization of the - - - of
23 the checkpoint, hopefully, it would include information
24 about why that date and time was chosen.

25 CHIEF JUDGE WILSON: But what if it said that a

1 lot of people at parades drink and so we're checking?

2 MR. ZENO: Well, if were a sobriety checkpoint, I
3 mean, I have a - - - I feel that that would likely be
4 enough. I guess a - - - a savvy defense counsel might want
5 to see if they were doing the same thing following the St.
6 Patrick's Day parade, or if it was just the Puerto Rican
7 Day parade, or the Caribbean Day parade. Inquiry into
8 those matters might be relevant.

9 JUDGE TROUTMAN: So did the defense offer
10 evidence that it was done in a discriminatory fashion
11 below?

12 MR. ZENO: Well, the defense did offer a witness
13 who was in the car, who said that - - - that they weren't
14 actually stopping every third car.

15 JUDGE TROUTMAN: But your - - - the - - - the
16 concerns raised by the Chief Judge with respect to, it's
17 only the Puerto Rican Day parade, and/or other minority
18 groups that are stopped, and it's not St. Patrick's or
19 anything else. Was there any evidence to suggest that?

20 MR. ZENO: No, there was no evidence of that.
21 But it's the People's burden to - - - to make that initial
22 showing. And - - -

23 JUDGE GARCIA: So Counsel - - - here, sorry.

24 MR. ZENO: Sorry.

25 JUDGE GARCIA: That, I think, is where I'd like

1 to go on - - - in terms of the burden. So if the People
2 came in, and I can hypothetically here show that there were
3 written guidelines - - - say they did these after parades,
4 they were looking for X, Y, and Z safety issues. Would you
5 be able to come up here now and argue but they didn't
6 disprove there was a discriminatory purpose?

7 MR. ZENO: I would say not without some proof in
8 the record that it - - - that it was being - - - that it
9 wasn't be - - - that it - - - these checkpoints were not
10 being fairly or - - - fairly authorized, that - - - that -
11 - -

12 JUDGE GARCIA: And doesn't that - - -

13 MR. ZENO: - - - it was singling out - - -

14 JUDGE GARCIA: - - - somewhat go to whose burden
15 it is to raise that issue? If we're saying the People
16 don't have the burden to come in and disprove a
17 discriminatory purpose, right?

18 MR. ZENO: Right, which is part of the reason why
19 I didn't start with the discriminatory purpose. I - - - I
20 raised discriminatory purpose because that's the context
21 about which we're talking about that.

22 JUDGE GARCIA: I see.

23 MR. ZENO: I - - - I said that it needed to be
24 authorized at the programmatic level because of this
25 concern that you don't want line officers making these

1 decisions, when it's ba - - - when it's - - - when the
2 stop-and-search is - - - is not based on a suspicion of
3 criminality.

4 JUDGE GARCIA: And that was your argument below?

5 MR. ZENO: Yes. And that wasn't present here.

6 JUDGE HALLIGAN: So your view is that if there is
7 testimony that explains what the programmatic purpose is
8 and explains why it would further that purpose to choose
9 this location and - - - and date, that you would not also
10 expect that the People would explain why this particular
11 date, as opposed to other parades, other circumstances?

12 MR. ZENO: Right, I - - - again, assuming that
13 it's authorized at the programmatic level by that, the
14 command level - - -

15 JUDGE HALLIGAN: Um-hum.

16 MR. ZENO: - - - adding that to your list, I - -
17 - I - - - I think that the - - - the defense would then be
18 under a burden to show some - - - some disproportionality
19 as to - - - to where the checkpoints are being authorized.

20 If I could turn - - -

21 JUDGE RIVERA: Well, that would go to an - - - a
22 discriminatory application of the policy. That would be
23 the - - - that you're recognizing that as a different
24 argument, it's about the application of the policy. The -
25 - - the policy on its face is neutral - - -

1 MR. ZENO: Right.

2 JUDGE RIVERA: - - - when you're looking at a
3 racially or ethnically discriminatory policy as applied.

4 MR. ZENO: Right. And in fact, defense counsel
5 below did make that challenge. But there was nothing in
6 the record, as it -- getting back to my first point,
7 there's nothing in the record about why it had been
8 authorized, who had authorized it. Without a witness with
9 that knowledge, that couldn't be explored.

10 If I could turn to my Marijuana Regulation and
11 Taxation Act point now, please?

12 The MRTA's reasonable cause standard applied to
13 Mr. Pastrana's Appellate Division appeal because the appeal
14 was a criminal proceeding occurring after the MRTA's
15 effective date, which was March 31st, 2023. Application of
16 the statute is retroactive in the sense that the new
17 reasonable cause standard can be applied to events that
18 happened in the past. But that does not depend on maxims
19 of statutory construction or common law retroactivity
20 principles, as respondent contends, but it depends on the
21 plain language of the statute.

22 Penal Law 222.05 amended the legal standard that
23 a court must apply.

24 JUDGE RIVERA: Why isn't the proper reading of
25 the statute - - - not - - - not that it applies

1 retroactively, but rather that the relief that the
2 legislature has set up for someone like your client is
3 instead that they can seek to vacate the sentence with
4 respect to this particular count?

5 MR. ZENO: I'm not sure I understand your
6 question, Your Honor.

7 JUDGE RIVERA: Well, I guess I'm wondering
8 whether or not it really ends up being a retroactivity
9 question if there are other remedies available to a
10 defendant in the position of your client.

11 MR. ZENO: Well, if - - - if Mr. Pastrana were
12 solely charged with marijuana possession - - -

13 JUDGE RIVERA: Um-hum.

14 MR. ZENO: - - - there - - - there clearly would
15 be a remedy for him. But he - - - that search, that
16 prohibited search, led to the recovery of a firearm. And
17 he's now doing a sixteen-plus sentence - - -

18 CHIEF JUDGE WILSON: The - - - the search - - -
19 just so I have the timing right - - - the search occurred
20 af - - - sorry, the search occurred before the legislation
21 was enacted, right?

22 MR. ZENO: Correct.

23 CHIEF JUDGE WILSON: So the police were - - - I
24 mean, the purpose of the exclusionary rule is to deter
25 unlawful police conduct, but the police conduct at the time

1 was lawful.

2 MR. ZENO: That's correct, Your Honor. And this
3 is not a - - -

4 CHIEF JUDGE WILSON: Prophylactic purpose isn't
5 really served.

6 MR. ZENO: But it is the purpose of the MRTA.
7 The MRTA, in a number of provisions, recognized that the
8 marijuana laws, as applied by the police, particularly the
9 police in New York City, are - - - were being unfairly
10 applied to communities of black and brown people. And they
11 - - -

12 JUDGE CANNATARO: But I guess the issue, Counsel,
13 is that the legislation provides a remedy for that
14 specific, you know, improper application of the law, which
15 is, as you heard, vacatur of a conviction for possession.
16 But this is a rather dramatic expansion to anything that
17 comes out of this search, which doesn't seem, I don't know
18 - - - I don't see it in the statute. How - - - how would
19 you argue that that's a natural consequence of the statute,
20 especially when it includes the remedies for violations
21 within it?

22 MR. ZENO: Because the MRTA has broad remedial
23 purposes. And yes, there are these limited remedies for
24 people who've been convicted of minor marijuana crimes.
25 But it wasn't capturing the harms that were done to people



1 that were stopped and searched in situations like this,
2 that led to, you know, the possession of other - - -
3 prosecution for the possession of other drugs - - -

4 JUDGE SINGAS: So you'd want - - -

5 MR. ZENO: - - - or weapons.

6 JUDGE SINGAS: - - - to extend MRTA to probable
7 cause determinations?

8 MR. ZENO: Well, if it's based solely on the
9 possession of a legal - - - now legal quantity of marijuana
10 or the odor of marijuana alone, it - - - the provisions by
11 a terms - - - by its terms, which are unusual,
12 unprecedented, really, in changing the reasonable cause
13 standard - - - yes, it does apply to - - - to a probable
14 cause determination.

15 JUDGE RIVERA: Your red light is on. And you
16 started with the non-Second Amendment challenges. If the
17 Chief Judge will permit, perhaps you can take a - - - at
18 least a minute to address, let's just say with
19 preservation, whether or not these challenges are
20 preserved.

21 MR. ZENO: The Second Amendment challenges?

22 JUDGE RIVERA: Yes, yes.

23 MR. ZENO: Yes. Sure.

24 So there was no objection raised to the Second
25 Amendment challenge here, to the - - - to our contention

1 that - - - that the CPW statute is unlawful,
2 unconstitutional, in light of - - - and violative of the
3 Second Amendment. But this court, in a series of cases
4 cited in our briefs - - - Patterson, Baker, Thomas - - -
5 has recognized that there is an exception to the
6 preservation rule - - - we call it a futility exception - -
7 - where the Supreme Court of the United States upends
8 existing law. The law in New York, in multiple Appellate
9 Division decisions, and this court's decision in People v.
10 Hughes, in every circuit court to have considered it,
11 applied a different constitutional standard than the
12 Supreme Court articulated in Bruen. When it - - - when a
13 new rule is announced by the United States Supreme Court
14 and it overturns existing New York law, preservation is
15 excused.

16 And Patterson, which dealt with the burden of
17 proof on extreme emotional disturbance, recognizes that
18 right - - - citing back to Baker, People v. Baker, citing
19 to O'Connor, a United States Supreme Court case that says
20 when there's a new rule that upends existing New York law
21 and it would've been futile to make any objection, which we
22 demonstrate here - - - the court would've been required by
23 law to deny it.

24 JUDGE TROUTMAN: What in New - - - New York's law
25 was upended?

1 MR. ZENO: I'm sorry?

2 JUDGE TROUTMAN: What in New York's law is no
3 longer allowed as a result of the Supreme Court?

4 MR. ZENO: Right. For starters, the proper cause
5 requirement. Bruen expressly struck down the proper cause
6 requirement.

7 JUDGE TROUTMAN: And how does that apply to your
8 client?

9 MR. ZENO: Well, the lic - - - in New York, it is
10 - - - you are excepted from the penal law crimes of
11 criminal possession of a weapon if you have a valid New
12 York license. The Supreme Court in Bruen found that the
13 New York licensing provisions were unconstitutional. My
14 client - - -

15 JUDGE SINGAS: Was it that broad a finding, that
16 all the licensing scheme was unconstitutional?

17 MR. ZENO: That - - - that the proper cause
18 requirement in the licensing scheme was unconstitutional.
19 And it also changed the method of reviewing the legality of
20 - - -

21 JUDGE TROUTMAN: What about the law-abiding
22 citizen aspect of the ruling?

23 MR. ZENO: Right. So the - - - the concurring
24 opinion talks about law-abiding citizens. And I - - - and
25 I assume you're getting at the fact that my client had at

1 least two - - - had three prior convictions. Two of them
2 were for gun possession, which are const - - - which, under
3 Bruen, is constitutionally protected under the Second
4 Amendment. One of them occurred when my client was
5 eighteen years old under - - -

6 JUDGE TROUTMAN: So you're saying under Bruen,
7 there's no - - - everyone has the right to carry and there
8 should - - - all licensing in New York has been struck - -
9 - stricken?

10 MR. ZENO: No, I'm not saying that all licensing
11 in New York has been stricken. I'm saying that, for - - -
12 for one thing, New York passed a revised licensing statute
13 almost immediately on the heels of Bruen. I question
14 whether some of its provisions are unlawful. I am arguing
15 that my client was unconstitutionally prosecuted,
16 convicted, and - - - and is serving a sixteen-year-to-life
17 sentence for carrying a weapon in public that was protected
18 by Bruen and - - - and the Second Amendment.

19 Again, there are a number of - - -

20 JUDGE RIVERA: Bruen did not - - - following up
21 on Judge Troutman's point here, Bruen did not hold that
22 regulation, right, regulation of public carry is
23 unconstitutional under the Second Amendment.

24 MR. ZENO: Absolutely - - -

25 JUDGE RIVERA: To hold that - - -

1 MR. ZENO: - - - I completely agree with that,
2 Your Honor, that the - - - the majority - - - Justice
3 Thomas' opinion said that - - - that states can regulate
4 the car - - - the public carry of licenses, provided
5 there's a - - - an historical precedent for it.

6 JUDGE RIVERA: This conviction is for an
7 unlicensed, right - - -

8 MR. ZENO: Correct.

9 JUDGE RIVERA: - - - possession?

10 MR. ZENO: Correct.

11 JUDGE RIVERA: Hughes said that that's what we -
12 - - that's what's criminalized, unlicensed possession. And
13 if licensing or regulating of public carry is lawful, is
14 permitted by the U.S. Supreme Court, what - - - what are we
15 to do if this - - - the proper cause can be severed from
16 the rest of the statute?

17 MR. ZENO: Well, proper cause can be severed
18 going - - - and it was, you know, legislatively severed
19 from the rest of the statute - - -

20 JUDGE RIVERA: Yes.

21 MR. ZENO: - - - going forward. We - - - here,
22 we have to look back. And I agree with Your Honor, if - -
23 - if I'm hearing it correctly, that my client would be
24 required to show that but for the unconstitutional
25 provisions in the licensing statute, he would've been able

1 to get a license. I'm saying that - - - that the proper
2 cause requirement is not the only unconstitutional
3 provision in the - - - in New York's then-existing
4 licensing statute.

5 JUDGE GARCIA: Is your client - - -

6 CHIEF JUDGE WILSON: I'm sorry. Go ahead.

7 JUDGE GARCIA: Is your client a prior felon?

8 MR. ZENO: Yes.

9 JUDGE GARCIA: So if he had made this motion,
10 wouldn't that have been litigated?

11 MR. ZENO: If - - -

12 JUDGE GARCIA: Whether or not a felon is
13 authorized, whatever - - - has been declared
14 unconstitutional - - - would the specific prohibition on
15 felons - - - getting these types of licenses, is
16 constitutional? But that was never litigated because it's
17 never raised.

18 MR. ZENO: It was never litigated and it was
19 never raised because the standard applicable in New York
20 was a means-end scrutiny standard, which a prior felon
21 would not have been able to - - - to meet that standard.
22 The - - - Bruen changed the standard that applies, changed
23 the law that applies. So - - -

24 JUDGE GARCIA: But would we apply the - - - that
25 portion of the licensing on prior felons under Bruen, and

1 then say does that pass constitutional muster under Bruen?
2 Is that what you're asking us to do then?

3 MR. ZENO: I think that a - - - that in - - - in
4 my - - - in my particular client's situation, it - - - the
5 conviction would need to be, if we don't prevail on the
6 other two issues, that the conviction would need to be sent
7 back for prior - - - for - - - for more fact finding, to
8 see whether he would've been able to get a license under a
9 - - - under the constitutional provisions of the statute as
10 - - - as they existed at the time that he was convicted.

11 JUDGE GARCIA: So - - -

12 JUDGE HALLIGAN: Counsel, what exactly do you
13 mean by the constitutional provisions? Because I thought I
14 heard you say that you perhaps had concerns with other
15 provisions in the statute.

16 MR. ZENO: I do.

17 JUDGE HALLIGAN: So how would - - - how would
18 that work?

19 MR. ZENO: And - - - and that would be - - - I'm
20 sorry.

21 JUDGE HALLIGAN: No. Go ahead.

22 MR. ZENO: And that would be what would be
23 litigated, you know, if it were sent back. The - - - the
24 People would have to show - - - my - - - my client would
25 say, for example, I would've been able to get a license but

1 for the proper cause requirement, but for the prior felon
2 requirement. The People would have to show a historical
3 tradition as it existed at the time of the Bill of Rights
4 was enacted or the due process clause was enacted in the
5 19th century - - - that that existed. And therefore, those
6 are constitutional limits consistent with the Second
7 Amendment, consistent with Bruen. And a determination
8 would be made if - - - if my client was harmed by the
9 unconstitutional licensing provisions.

10 JUDGE RIVERA: Those are the only two but-for
11 classifications? Is - - -

12 MR. ZENO: Sorry?

13 JUDGE RIVERA: Those are the only two but-for
14 classifications?

15 MR. ZENO: No. I mean, I - - - it would depend
16 on what provisions the People would say that - - - that
17 would've disqualified my client from getting a license. As
18 I mentioned, the - - - the first conviction my client had
19 for possessing a weapon happened when he was eighteen years
20 old. Now, is there a historical tradition - - - and there
21 are a couple of district court cases that have found that
22 there is not - - - is there a historical tradition for
23 forbidding eighteen-year-olds from - - - disarming
24 eighteen-year-olds?

25 JUDGE SINGAS: But isn't the point that the

1 People weren't able to do that because it wasn't preserved,
2 and these issues couldn't have been raised?

3 MR. ZENO: Well, it wasn't preserved - - -
4 getting back to the ini - - - where we started because
5 there was - - - New York law essentially applied different
6 standards, had found repeatedly, over and over again, that
7 this was a constitutional licensing scheme. And it
8 would've been futile for my - - - for my client's attorney
9 at the time to make this objection. There are thousand - -
10 - this would've been happening in thousands of courtrooms
11 across the state, essentially lawyers arguing that the - -
12 - that the - - - that this CPW regime across courtrooms in
13 New York State is - - - is unlawful. And it would've - - -
14 it's just futility - - - an exercise in futility.

15 JUDGE GARCIA: But the futility argument seems a
16 little more nuanced if you're looking at Hughes, right?
17 Because in Hughes, this court really didn't decide much in
18 terms of the issue. I - - - I understand your point on the
19 test - - - other than I think it was a misdemeanor effect
20 on your ability to get a home carry - - - a home - - -

21 MR. ZENO: Um-hum.

22 JUDGE GARCIA: - - - permit, permit to have a gun
23 in the home. So it didn't preclude - - - we never - - -
24 this court never ruled on whether the felony possession
25 part of that statute, even under the old test, would've

1 passed muster. You're saying you're going to have to make
2 it because you're assuming applying the old test.

3 I think this is - - - what I'm getting at, I
4 think there's a difference between deciding the substantive
5 issue that you seek to raise and deciding which test is
6 going to apply to the analysis.

7 MR. ZENO: Well, if the purpose of preservation
8 is to make a record that can be useful to the appellate
9 courts, if my client's lawyer had objected on Second
10 Amendment grounds, the court would've, in - - - in
11 assessing whether that was a valid objection, the court
12 would've applied means-end scrutiny - - -

13 JUDGE GARCIA: But we would've known the felony,
14 the argument about the statute; we would've known certain
15 things in this record we don't have now in terms of
16 assisting us in making a decision, right?

17 MR. ZENO: Yes, but there would've been - - - it
18 would've just been an al - - - assuming that the court
19 entert - - - the court below entertained those arguments
20 and didn't just dismiss them out of hand because every New
21 York court who has considered the licensing statute,
22 including the First Department, and to some extent this
23 court, has dismissed those allegations. There would be - -
24 - there wouldn't be a record upon which to work. It's - -
25 - I mean, assuming - - - we'd be assuming that the court

1 were to say, well, the law's against you, but let's have a
2 - - - let's have a - - - a full showing, put the People to
3 their proof. What other provisions of this licensing
4 statute, other than proper cause, would've been a lawful
5 bar to this defendant getting a license? It just - - -
6 it's speculative and hypothetical to - - - to engage in
7 that - - - that thinking.

8 JUDGE RIVERA: So if I'm - - - I'm understanding
9 this, your point is that it would've been futile to make
10 any of these arguments before Bruen because the law was
11 settled in New York based on a different test, that the
12 licensing scheme was constitutional, was lawful, was not
13 infirm under a Second Amendment analysis. And so it's only
14 when, as you're arguing, in Bruen, the Supreme Court adopts
15 a different standard by which to determine the
16 constitutionality of a regulatory scheme, that your client,
17 and perhaps others like your client - - - perhaps some
18 right behind you, counsel for those clients - - - are
19 arguing that it's at that point, you say, aha, I do have a
20 basis now. I didn't before, but I do now. Am I - - - am I
21 getting this - - -

22 MR. ZENO: Yes.

23 JUDGE RIVERA: - - - argument? Am I
24 understanding this argument?

25 MR. ZENO: That's correct.



1 JUDGE GARCIA: How far does that go on an issue
2 where it's the test itself that's an issue and not the
3 substantive issue you're raising? So I mean, how do we
4 extend that? If there's a change later in a particular
5 standard that you're analyzing issues, then everyone who's
6 never raised that issue can say, well, you have a different
7 standard now, and it would've been futile to raise it, even
8 though this court has never considered the particular - - -
9 the issue that that standard would be applied to?

10 MR. ZENO: Yes. Good question. I know that it
11 applies here because Bruen is - - - is unique, at least in
12 my life - - - legal lifetime. Maybe if we go back to
13 Payton or Bruton, cases like that - - - there was this
14 upending - - - that's maybe why Patterson hasn't been cited
15 for this principle in forty-three years. Bruen is unique.
16 It's a unique situation. I don't think that this would
17 happen very often. I think it would hap - - - it happens
18 very rarely. First time in my, again, my legal lifetime,
19 where the - - - where - - - where every circuit in the
20 country, every - - - every appellate court in this state
21 has agreed upon, you know, means-end scrutiny applies to
22 Second Amendment challenges, and the Supreme Court says no,
23 you're wrong; we're applying a different standard.

24 CHIEF JUDGE WILSON: Thank you.

25 MR. ZENO: Thank you.



1 MS. NECKLES: Good afternoon. May it please the
2 court, ADA Nicole Neckles for the Office of Darcel D.
3 Clark.

4 Like Counsel, I would like to start with the two
5 issues that are pertinent to this case.

6 JUDGE GARCIA: Counsel, it does seem to be a very
7 thin record on the justification for the roadblock, for
8 this checkpoint stop.

9 MS. NECKLES: Your Honor, before we even get to
10 that issue, it is our position that this is a mixed
11 question of law and fact. And we would only get to that if
12 this court determined that there was no record support.

13 Here, on the other hand - - -

14 JUDGE GARCIA: - - - [inaudible] the record
15 support is for your position on it.

16 MS. NECKLES: The record support here is a
17 testimony of Det. Veit. Det. Veit testified about the
18 primary purpose of the checkpoint. He unequivocally stated
19 it was a vehicle safety checkpoint. To the extent he
20 mentioned other things, those were not changing or
21 evolving. The - - -

22 JUDGE GARCIA: How about the authorization for
23 the checkpoint?

24 MS. NECKLES: As to the authorization, he
25 mentioned that this was a unique assignment that was given

1 to him on that day. He typically is in plain clothes,
2 using a part of his - - - his special group. But on that
3 date, he was assigned to this posting.

4 CHIEF JUDGE WILSON: That kind of makes it - - -

5 JUDGE HALLIGAN: Can you point us to anything in
6 the record that specifically explains why the purpose of
7 vehicular safety was served by a roadblock on this day in
8 this location?

9 MS. NECKLES: There is no specific testimony
10 about this. But the court says you can rely on the
11 testimony and the reasonable inferences that could be drawn
12 from that testimony.

13 JUDGE HALLIGAN: So what - - - what is the
14 testimony from which we would draw a reasonable inference,
15 that the purpose of vehicular safety was served by this
16 particular roadblock?

17 MS. NECKLES: Because, Your Honor, this roadblock
18 was set up on a day following a parade. It was set up on a
19 bridge from the Manhattan - - - traffic from Manhattan into
20 the Bronx. It is reasonable to anticipate that on that
21 date, there will be heavy traffic. And therefore, the
22 officers would be able to stop a number of cars and would
23 be able to inspect a number of cars, and that it would - -
24 - reasonable that this time and the day - - - the time of
25 it that was set up during daylight hours - - - that that

1 would serve the purpose, that the - - - the state would be
2 able to check a lot of vehicles, which is what they were
3 interested in, to ensure that the - - - the vehicles
4 traveling on the streets were safe and - - -

5 JUDGE SINGAS: What about the stop of every three
6 cars? It seemed that there was some discrepancy there.
7 Why not bring the officer in who was directed to stop every
8 third car and give testimony to that?

9 MS. NECKLES: Your Honor, there was no
10 discrepancy. The officer, Det. Veit's testimony, was
11 credited by the lower court. He was found to be credible.
12 His testimony was that they were directed to stop every
13 third car. An officer was specifically assigned to that
14 task.

15 JUDGE SINGAS: Regardless of his direction,
16 though, I don't think he was able to say that he actually
17 counted the cars or knew that that was in fact what was
18 happening. Am I right about that?

19 MS. NECKLES: He - - - that is correct, he could
20 not. But again, our initial burden is to present evidence
21 showing the legality of the conduct. And the court has
22 directed the lower courts to look at the totality of the
23 circumstances. And the concern is whether or not these
24 stops are being done in an arbitrary manner or not. And
25 where we've submitted sufficient evidence through this

1 testimony, that this stop was properly authorized for a
2 proper reason, neutral limitations - - -

3 CHIEF JUDGE WILSON: Well, let me stop you on
4 that authorization again.

5 MS. NECKLES: - - - were in place - - -

6 CHIEF JUDGE WILSON: Because when you were
7 answering the question about authorization, you - - - you
8 referred to the officer's testimony that this was a unique
9 assignment for him; it wasn't something he usually did.
10 And to my mind, that actually would suggest a lack of
11 authorization, right? It's - - - somehow somebody told me
12 to do this, but it was not something that'd ever happened
13 to him before.

14 MS. NECKLES: No, Your Honor. That is stating
15 that he's typically part of this specialized group - - -

16 CHIEF JUDGE WILSON: Um-hum.

17 MS. NECKLES: - - - that usually is in plain
18 clothes and traveled throughout the - - - the city.

19 CHIEF JUDGE WILSON: And that doesn't do this
20 sort of thing normally?

21 MS. NECKLES: Norm - - - exactly.

22 CHIEF JUDGE WILSON: Right.

23 MS. NECKLES: But on this date - - - to get an
24 officer's assignment changed, certainly that is not being
25 done by the line officer. That is indicative that a

1 superior officer made that determination, told him on this
2 date, you're coming in, we're going to create a - - - we're
3 going to have a checkpoint. And certainly, it's reasonable
4 that for a parade there's limited resources. The police
5 can determine how to best use that - - - resources. And on
6 that date, given the parade and the number of officers out,
7 that it - - - they would use these officers in this manner.

8 So that - - - that evidence, I feel, is strong
9 evidence that this is not an arbitrary decision made by the
10 line officers, but - - -

11 JUDGE RIVERA: The - - - the - - -

12 MS. NECKLES: - - - rather was by the
13 programmatic - - -

14 JUDGE RIVERA: Is there evidence in the record as
15 to whether the members of this unit were the only ones
16 involved in the roadblock?

17 MS. NECKLES: There was no - - - there was no
18 evidence specific as to that. This - - -

19 JUDGE RIVERA: So we don't know either way?

20 MS. NECKLES: We do not. This officer was - - -
21 and I know the other - - - his partner for the day - - -
22 was not part of the same unit but a similar unit that was
23 also pulled in - - -

24 JUDGE RIVERA: That specialize and does not
25 normally handle these kinds of vehicular traffic - - -

1 MS. NECKLES: Exactly. And to the extent that
2 the court expressed concern about the discriminatory nature
3 of that, again, the suppression court is uniquely able to
4 look into that issue, look at the evidence as submitted,
5 and make that determination. Here that argument was
6 raised. But the only evidence they submitted was that one
7 - - - a passenger of the car said he observed one car was
8 stopped and another car wasn't stopped. That is certainly
9 - - - the court was able to assess that and say, this is no
10 discriminatory no - - - purpose was shown here.

11 The People met its initial burden. Defendant
12 bears the burden of proving the illegality of the conduct.
13 Here they did not. And where we've met our initial burden,
14 this is a mixed question of law and fact, and it's beyond
15 this court's review. And - - - and - - - and we would find
16 that we did meet our burden.

17 If there's no further question, I would address
18 the - - - the search, the stop - - - the search of the
19 defendant's car. Penal Law section 222.05 sub 3, enacted
20 as part of the MRTA, does not apply to this search for two
21 reasons. It is not retroactive, thus it does not apply to
22 cases pending on appeal. Moreover, the plain language of
23 the statute demonstrates that it is not applicable to cases
24 pending on appeal.

25 As this court reiterated just last year in People

1 v. Galindo, newly enacted statutes are presumed to apply
2 prospectively. Retroactive application will only be found
3 where the legislation expressed an intent that the statute
4 be applied retroactively. Nothing in the statute, either
5 expressly or by necessary implication, indicates the
6 legislature intended to have that effect.

7 In fact, as the court noted, if you look at the
8 scheme of the statute, it shows that retroactive intent - -
9 - application was not intended. The legislature was
10 concerned with marijuana. It considered how it will
11 address that issue moving forward. It spoke on that issue.
12 It vacated certain convictions. It provided for defendants
13 to have an opportunity to bring a motion if their case was
14 not automatically vacated. It expunged certain records,
15 and it created a resentencing procedure.

16 So here, where the court spoke on the issue of
17 the - - - the retroactivity of the statute, its silence on
18 this particular such statute speaks volumes. And it says
19 that the court did not intend that the statute be applied
20 to cases pending on appeal.

21 And to give another reading - - - a more broad
22 reading, and to say it applied to - - - to such cases,
23 would certainly not reflect the legislature intent in - - -
24 in that - - - on that nature.

25 JUDGE CANNATARO: Is it your position that - - -

1 I know you don't think the statute has any retroactive
2 effect beyond the things that you just addressed. But if
3 it does, it would only apply to cases pending on appeal?
4 What - - - I don't understand what would stop it from going
5 back to any conviction that was based on a MRTA violation.

6 MS. NECKLES: Well first, the issue in this case
7 is whether it applies to cases pending on appeal. And we
8 would say it does not. But more broadly, we would argue
9 that it only applies to searches that occurred from the
10 effective date moving forward.

11 To - - - to make it apply to cases beforehand
12 really - - - as again, there's no int - - - expression of
13 that intent in the legislative history. And certainly,
14 what the legislature, as I said, was concerned about was
15 marijuana.

16 Here, to read it to apply to any case, regardless
17 of the issue, it would - - - it would invalidate cases such
18 as this one - - - gun convictions, homicides possibly - - -

19 CHIEF JUDGE WILSON: It would do that
20 prospectively, right?

21 MS. NECKLES: Excuse me?

22 CHIEF JUDGE WILSON: It - - - it would do that
23 prospectively?

24 MS. NECKLES: Exact - - - it would prospectively.

25 CHIEF JUDGE WILSON: Yeah.

1 MS. NECKLES: But again, the - - - you know, at
2 this point, the officers would be on notice - - -

3 CHIEF JUDGE WILSON: Right.

4 MS. NECKLES: - - - and that would be changed.
5 Here, there was no illegality in the officer's conduct at
6 the time they conducted this search. That was the law at
7 the - - - at the time, that the odor of marijuana provided
8 probable cause for a search. And so there would've been no
9 deterrent purpose that would be served by making - - - to
10 read the law so broadly as to vacate such searches that
11 occurred prior to the enactment.

12 I see my time is up. But I don't know if the
13 court wants me to address Bruen or if you would leave it to
14 my - - -

15 CHIEF JUDGE WILSON: I think if you would like a
16 few minutes to address Bruen, it would be fair to let you
17 do so.

18 MS. NECKLES: I would just generally state,
19 defendant's Second Amendment claim is not subject - - - I'm
20 sorry - - - to this court's review because it is
21 unpreserved. Separately because defendant lacks standing,
22 because he - - - he's never subjected himself to the
23 licensing procedure. And on the merits, the claim should
24 be denied because defen - - - that Bruen did not invalidate
25 New York's entire licensing scheme. It merely invalidated

1 the concealed permit regime.

2 Finally, defendant's as-applied challenge fails
3 because his status as a felon would've prevented him from
4 getting a license of any kind. If you have any questions.

5 I would just briefly state, just to address
6 counsel's futility argument, just briefly state that, Your
7 Honor, courts have not adopted this futility argument for
8 good reason. Preservation is important. It is the way an
9 issue is developed and can be brought to this court's
10 attention, and - - - so that the court can have the facts
11 it needs to determine whether or not a law needs to be
12 revisited and changed - - -

13 CHIEF JUDGE WILSON: That's sort of the difficult
14 thing about this here. So let's assume that that's a
15 correct statement of the reason for preservation. Okay?
16 Suppose that the defendant here, before his trial, had said
17 the - - - the proper cause requirement is unconstitutional
18 under the Second Amendment. Right? What kind of a record
19 would then have been built? Because Bruen hadn't been
20 decided. So you wouldn't - - - you probably have either
21 just a back-of-the-hand sorry, you know, the law is
22 controlling, or perhaps they would allow some - - - some,
23 you know explanation. But it's hard to imagine that a
24 trial court on a criminal possession of a weapon charge
25 would allow a full-blown, you know, bunch of legal

1 historians putting in the type of record that was on the
2 Supreme Court.

3 MS. NECKLES: Right.

4 CHIEF JUDGE WILSON: So the record here wouldn't
5 have contained that. So I think all we would end up doing,
6 if this had been preserved by saying, I have a Second
7 Amendment right, is we would end up remitting for the
8 development of that kind of record because we don't have it
9 now.

10 MS. NECKLES: That is correct. But I think
11 that's why there's an interplay between the preservation
12 and the standing. If defendant had at least taken the
13 legal route and have sought a license, certainly then, a
14 more robust record would have been developed.

15 CHIEF JUDGE WILSON: I - - - I worry - - - I
16 wonder about the standing. Because it - - - standing I
17 think of as sort of injury in fact.

18 MS. NECKLES: Right.

19 CHIEF JUDGE WILSON: And he's injured in fact,
20 he's been prosecuted. He's in prison. It's - - - it's
21 more - - - what you're describing to me sounds more like an
22 exhaustion. You know, he - - - he didn't exhaust his - - -
23 his way of potentially getting a license.

24 MS. NECKLES: I - - - I would disagree, Your
25 Honor, because - - -

1 CHIEF JUDGE WILSON: And - - - and when you're
2 thinking of it as standing, I think those are in cases - -
3 - those aren't in criminal prosecution cases; those are in
4 cases where somebody was challenging a licensing regime,
5 and they hadn't in fact applied for a license, which seems
6 to me different.

7 MS. NECKLES: In - - - In Decastro, I believe
8 this court said that standing was required. And that was a
9 criminal case. So it's not just in civil. I believe it's
10 - - - standing has also applied to - - - to criminal
11 proceedings.

12 And the - - - the question here that Your Honor
13 is - - - yes, the law may have been difficult for the
14 defendant to have need - - - to have succeeded on - - - on
15 such a claim. But that is the case in many - - -

16 CHIEF JUDGE WILSON: No, I'm asking a different
17 question. It's really whether - - - if the purpose is to
18 have a record - - -

19 MS. NECKLES: Right.

20 CHIEF JUDGE WILSON: - - - and the conclusion is
21 because the state of the law was such he wouldn't have had
22 a record anyway, in that circumstance, what's the purpose
23 of preservation?

24 MS. NECKLES: I think it assumes facts, Your
25 Honor. And - - - and we don't - - - and we don't know.

1 And that is - - - so it - - -

2 CHIEF JUDGE WILSON: Yeah, but I think - - -

3 MS. NECKLES: - - - it is possible - - -

4 CHIEF JUDGE WILSON: - - - counsel is not asking
5 us to decide the case in this client's favor in the sense
6 of vacating the conviction but rather to remit it for some
7 kind of proof.

8 MS. NECKLES: In this instance, remittal will
9 serve no purpose. As Counsel concedes, his client is a
10 felon, has three prior felony convictions. And the Supreme
11 Court, in Bruen, Heller, McDonald, has made very clear that
12 felons are a citi - - - a group that is excluded from that
13 Second Amendment privilege.

14 And so for - - - in this instance, remittal would
15 just serve no purpose.

16 JUDGE RIVERA: What if - - - what if the prior
17 felonies are the same count, the same crime? That's - - -

18 MS. NECKLES: Bruen does not - - -

19 JUDGE RIVERA: - - - that is being challenged as
20 - - -

21 MS. NECKLES: That is - - -

22 JUDGE RIVERA: - - - unconstitutional.

23 MS. NECKLES: That is true, Your Honor, that he -
24 - - his pri - - - two of his prior felonies is for the
25 attempted possession of a gun. But Bruen does not

1 invalidate those prior convictions. Defendant had an
2 obligation to have pursued from the initial proper
3 procedure and have attempted to have gotten a license. And
4 that is what was punished, the unlicensed possession of
5 that gun. He did not have it. He was properly convicted.
6 And those convictions remain standing regardless of Bruen.

7 And so therefore, he would still be considered a
8 felon.

9 CHIEF JUDGE WILSON: I understood his argument to
10 be a little bit different. And maybe you'll correct me on
11 rebuttal. But I understood it to be that he would want a
12 chance to prove that there was no historical practice of
13 disarming felons back several hundred years ago.

14 MS. NECKLES: It - - - that might be.

15 CHIEF JUDGE WILSON: So that even those
16 convictions are valid convictions, the - - - the felon
17 disenfranchisement portion is also invalid under the
18 analytical method of Bruen.

19 MS. NECKLES: Our position is the Supreme Court
20 has already answered that. It has conducted that analysis,
21 and it has said felons are excluded - - -

22 JUDGE HALLIGAN: Where - - - where, in your view,
23 has the Supreme Court done that?

24 MS. NECKLES: I believe in Bruen, as the court
25 repeatedly talked about the history of - - - of - - - of

1 felons. It - - - it noted - - - Judge Thomas noted - - - I
2 apologize, I don't have it - - - but Judge Thomas spoke
3 repeatedly about the fact that felons historically has been
4 exempted from - - - from possessing a gun, and that that -
5 - - that the courts - - - that the states may continue to
6 enforce licensing schemes that exclude felons, that include
7 - - -

8 JUDGE GARCIA: Isn't there a Third Circuit
9 opinion that doesn't say that?

10 MS. NECKLES: I apologize?

11 JUDGE GARCIA: I think there's a Third Circuit
12 opinion that says a felony 4 false statement doesn't
13 qualify as a fel - - - for a felon in possession predicate.

14 MS. NECKLES: I - - - I believe that's Ra - - -
15 DeRange (ph.) - - - Grange (ph.), Range decision. That is
16 true. But that's not the case here. Defendants - - - is
17 prior convictions is for violent felony, the possession of
18 a gun. So while maybe there may be a discussion lower on
19 as to whether certain types of felonies may be excluded,
20 that certainly is not the case here.

21 Thank you.

22 CHIEF JUDGE WILSON: Thank you.

23 MS. KOWALSKI: Good afternoon, Your Honor. Nikki
24 Kowalski, appearing for the Attorney General as intervenor.

25 Addressing first the futility question. The - -

1 - the premise of Mr. Pastrana's argument is - - - is
2 incorrect in - - - in both respects. There was no
3 controlling New York case law that held that the proper
4 cause requirement was unconstitutional.

5 JUDGE HALLIGAN: Can I just ask you a little bit
6 further about that? If - - - even if that's right, I think
7 your adversary points out that under Hughes, the means-ends
8 test was generally in place. And if that's right, what
9 would a defendant have argued as a practical matter as to
10 why the Second Amendment precluded a conviction here? What
11 would you - - - what would you say in light of Hughes?

12 MS. KOWALSKI: I would say that a - - - a
13 defendant could've argued that the - - - the historical
14 analysis paradigm was not decided by - - - by this court,
15 was not rejected in Hughes. Because it wasn't even
16 presented in Hughes. I actually appeared in Hughes as
17 intervenor in that case. And - - - and never was that
18 argument made. So there wasn't a dispute about it. So a
19 defendant, I think, could legitimately say that that form
20 of analysis was not considered and was - - - was not
21 rejected in Hughes.

22 Moreover, a - - - a defendant - - - a defendant
23 at the time of Mr. Pastrana's trial had a lot of material
24 out there in the legal universe in which to argue that the
25 proper cause requirement was - - - you know, was invalid

1 bef - - - six months before his trial in this case. The
2 D.C. Circuit issued a permanent injunction against the
3 enforcement of a provision in the D.C. law that was nearly
4 identical to the provision in New York law that was
5 ultimately - - -

6 JUDGE RIVERA: So - - - so then, is your rule
7 that the burden is that defense counsel has to be aware of
8 - - - because you're now referring to these foreign
9 jurisdiction challenges, regardless of the facts,
10 regardless of whatever might be the statutory structure in
11 those other jurisdictions. The fact that someone somewhere
12 in the ethos is arguing something means that defense
13 counsel should've been aware, should've made these claims.

14 MS. KOWALSKI: Your Honor, I think that in 2017,
15 it was very clear to anyone - - -

16 JUDGE RIVERA: So then is counsel ineffective for
17 having failed to do that here? Does that give the
18 defendant another path?

19 MS. KOWALSKI: Not in a - - - not ineffective.
20 Because, you know, a reasonable attorney could have decided
21 that these claims were unlikely to carry the day and that
22 other arguments that he - - -

23 JUDGE RIVERA: Well that - - - what would make
24 that a reasonable conclusion, if not the state of the law
25 in New York?

1 MS. KOWALSKI: The - - -

2 JUDGE RIVERA: I'm just trying to get a sense of
3 the - - - of the rule that - - - that you're advocating for
4 on this, that this is not futile because we - - - I - - - I
5 understood you to mean we had not squarely ever rejected
6 such an argument, so therefore, you can make such an
7 argument.

8 MS. KOWALSKI: The standard for effective
9 assistance of counsel is not that you would make every
10 possible argument that's out there. And - - - and so that
11 - - - that, I don't think, is the appropriate way to, with
12 all respect, not the appropriate way to look at the
13 question about whether this was - - - where there was a
14 path to making a - - -

15 JUDGE RIVERA: An argument that has little or no
16 chance of success?

17 MS. KOWALSKI: I'm sorry?

18 JUDGE RIVERA: An argument that has little or no
19 chance of success?

20 MS. KOWALSKI: No, it's not that it - - - there
21 was - - - if the proper argument had been made, there was a
22 possibility - - - not that it was a clear winner, but that
23 there was a possibility that you could - - - that a
24 defendant who pointed to the decision in the D.C. court,
25 which was Wrenn against the District of Columbia, which is

1 864 F.3d 650, and then also pointed to other - - - other
2 opinions by other judges that had actually anticipated that
3 - - - that Heller had actually adopted a historical
4 analysis test, as - - -

5 CHIEF JUDGE WILSON: So - - - so I would like to
6 get - - - be clear on the Attorney General's position. It
7 sounds to me as if you are not saying there is no futility
8 exception ever. You're saying, essentially, there could be
9 one, but there isn't one here, because it wasn't futile,
10 because there was - - - there were enough signposts. Is
11 that right?

12 MS. KOWALSKI: I would say both things, Your
13 Honor.

14 CHIEF JUDGE WILSON: Well - - -

15 MS. KOWALSKI: It was particularly not futile
16 here because the law was evolving at - - - at the relevant
17 time.

18 CHIEF JUDGE WILSON: But - - -

19 MS. KOWALSKI: But you're - - - but a futility
20 exception - - -

21 CHIEF JUDGE WILSON: Well, you started off by
22 saying there wasn't a controlling decision from this court.
23 So I guess that begs the question of well, what if there
24 had been a controlling decision of this court that, right
25 on point, foreclosed the argument, you'd still say, too

1 bad, it has to be preserved?

2 MS. KOWALSKI: It's the - - - it's the job of - -
3 - of defense counsel to make the argument and say that
4 because this court, like the Supreme Court, can reconsider
5 earlier precedents. So you - - -

6 JUDGE RIVERA: But then does that mean your
7 argument is raised before this court? If we're - - - we're
8 taking the example the Chief Judge has - - - has given you
9 now, which is this court speaks. The final arbiter has
10 spoken. Isn't - - - isn't then what the defendant has
11 available to them, or the party has available to them, the
12 opportunity to make the argument to this court? We're the
13 only ones who would - - - or this is the court that could
14 overrule its prior decision.

15 MS. KOWALSKI: The doctrine of preservation - - -

16 JUDGE RIVERA: Um-hum.

17 MS. KOWALSKI: - - - says that the - - - a
18 defendant who would like to see a change in the law raises
19 that claim at the first instance in which it - - - the - -
20 - the decision has to be made. And - - -

21 JUDGE HALLIGAN: But to what practical end,
22 exactly? So if - - - to - - - to pick up on the Chief's
23 questions - - - if there was controlling precedent from
24 this court, either with respect to a specific issue or the
25 governing test, I suppose you could make the argument

1 simply to have a placeholder for purposes of potential U.S.
2 Supreme Court review. But how would you be, you know,
3 generating a record that would serve the typical purposes
4 of preservation?

5 MS. KOWALSKI: Again, it - - - in 2017, I think a
6 defendant could have argued to the trial court that the - -
7 - based on the decision in - - - in Wrenn, that the proper
8 cause standard was unconstitutional. And based on Heller
9 and other decisions, mostly dissenting decisions by - - -
10 by other judges, but arguing on the basis of Heller that
11 the proper analysis was a historical analysis. And I just
12 don't think that it does much - - - or it doesn't take into
13 account the fact that there - - - trial court could listen
14 to this and - - - and could be persuaded by it. You have
15 to give credit to trial court judges that they are capable
16 of evaluating arguments like this. And some - - -

17 JUDGE RIVERA: What would be the opening - - -

18 MS. KOWALSKI: - - - might have been persuaded.

19 JUDGE RIVERA: - - - what would have been the
20 opening in existing New York law for such an argument? Or
21 is your position that Heller - - - Heller made it plain
22 that one could make this argument?

23 MS. KOWALSKI: Well, argu - - - Bruen - - -

24 JUDGE RIVERA: Um-hum.

25 MS. KOWALSKI: - - - the - - - the court in Bruen

1 said that - - -

2 JUDGE RIVERA: Um-hum.

3 MS. KOWALSKI: - - - Heller actually applied a
4 historical test.

5 JUDGE RIVERA: Um-hum.

6 MS. KOWALSKI: And what was open was that Hughes
7 did not reject the historical test. The - - - the argument
8 was just never made. And that is a commonplace argument
9 that defendants don't apply - - -

10 JUDGE RIVERA: What test did Hughes apply?

11 MS. KOWALSKI: Excuse me?

12 JUDGE RIVERA: What test did Hughes apply? If
13 you're saying it - - -

14 MS. KOWALSKI: Hughes - - -

15 JUDGE RIVERA: - - - didn't reject the historical
16 test?

17 MS. KOWALSKI: Hughes was about a sentencing
18 issue. It - - - it was not about the proper cause
19 requirement. And the test that it applied about means-ends
20 was - - - again, was not adopted over an argument that's -
21 - - that was - - - that the historical test was the proper
22 test.

23 JUDGE RIVERA: So - - - so the - - -

24 MS. KOWALSKI: And so - - -

25 JUDGE RIVERA: - - - and again, correct me if I'm

1 misunderstanding this response that you just gave. Your -
2 - - your response is the court adopted a test and applied a
3 test. But because no one said there should be a different
4 test, then no counsel on the defense side should ever
5 assume that they couldn't say, that test that you used was
6 the incorrect test.

7 MS. KOWALSKI: I - - - counsel could have said -
8 - -

9 JUDGE RIVERA: So then, when we adopt a test, if
10 I'm getting this right - - - I may be wrong. When we adopt
11 a test, that is not actually the court saying this is the
12 only test. There might be another test. We'll wait to see
13 if someone argues a different test to us.

14 MS. KOWALSKI: If I - - - the defendant in this
15 case could have said Hughes is not authority, that the
16 historical test is invalid because that question was never
17 presented to the court, and they made no ruling on it.

18 JUDGE HALLIGAN: But - - - but isn't the
19 question, following Bruen - - - I - - - I think Bruen says,
20 but - - - but correct me if - - - if you have a different
21 read - - - that you look only at historical tradition, and
22 you don't look at whether it satisfies the means-ends
23 nexus. So if that's, you know, a fair reading of Bruen,
24 then doesn't that mean that you can't show - - - and I - -
25 - think this is at the core of the dispute between the

1 majority and the dissent in Bruen - - - you can't show that
2 a statute passes Second Amendment scrutiny by relying on
3 the means-ends nexus. Do you - - - do you agree with that
4 read - - -

5 MS. KOWALSKI: Yes.

6 JUDGE HALLIGAN: - - - on Bruen? Okay. So - - -
7 so then, if that's - - - if that's right, what would a
8 defendant have said about why this court should look only
9 to the historic tradition and could not rely on means-ends
10 nexus?

11 MS. KOWALSKI: Again, the - - - my answer to that
12 is this court didn't reject it. And it's an open question,
13 as far as a historical analysis - - - an open question in
14 this court. And a defendant could've argued that this is
15 what Heller demanded. And there were - - - there were
16 judges across America on - - - who - - - who were - - - who
17 were crediting that argument.

18 I - - - I would also just like to say a couple
19 words on the argument that counsel made about Patterson.
20 Patterson does not create a separate rule for changes in
21 the law that are announced by the Supreme Court that
22 overturn or are inconsistent with - - - with prior rulings
23 from this court. The language in Patterson that defendant
24 is relying on, and in that respect is best understood as
25 more of an explanation about why a mode of proceedings

1 exception to preservation is appropriate - - - this court
2 has, in the forty-seven years since Patterson was decided -
3 - - the - - - this court has not looked to that language or
4 applied that language in the way that Mr. Pastrana is
5 asking that it be applied here in - - - in fact.

6 And during all this time, when there have been
7 other challenges that have been brought before this court
8 based on intervening changes by - - - by the Supreme Court,
9 this court has actually applied the preservation
10 requirement.

11 Mr. Zeno pointed - - - or identified Payton as
12 kind of a game-changing change in the law that was
13 comparable to Bruen. And it's worth pointing out that when
14 Payton claims came in front of this court following that
15 decision, the court applied preservation and declined to
16 hear them.

17 And just briefly on standing, it's another reason
18 that this court should reject Mr. Pastrana's claim. If - -
19 - if Mr. Pastrana had a complaint about the
20 constitutionality of the New York gun licensing laws, the
21 place to bring it was in a license application. He - - -
22 this court should not entertain the idea of bringing these
23 challenges in the first instance in a criminal prosecution.
24 Because to do so, it - - - it really undermines the
25 integrity of the licensing regime entirely.

1 CHIEF JUDGE WILSON: But then your - - - then
2 your preservation argument sort of falls away if you're
3 saying, really, you couldn't - - - you can't do this at all
4 because of standing reasons. I don't even know why we're
5 thinking about preservation.

6 MS. KOWALSKI: I'm sorry, can - - -

7 CHIEF JUDGE WILSON: Well, you spent a whole lot
8 of time saying he actually could have raised this. And - -
9 - and therefore, it should've been preserved because he had
10 the ability to raise it. That was - - - that was - - -
11 we've spent a lot of time on that for preservation. But
12 now you're saying you can't actually raise it in a criminal
13 prosecution at all.

14 MS. KOWALSKI: These are separate things. And in
15 - - - in another case, they - - - they're separate
16 considerations. But he - - - they could be. And - - - for
17 instance, you know, Mr. Pastrana - - -

18 CHIEF JUDGE WILSON: So if there was a criminal -
19 - - if the criminal statute prohibiting speech of a certain
20 sort that's constitutionally protected and somebody's
21 prosecuted under it, they can't raise the First Amendment
22 as a defense? They need to challenge the licensing scheme?

23 MS. KOWALSKI: Only if the - - - the - - - the
24 case law that Mr. Pastrana relies on to exempt him from the
25 - - - the standing requirement are - - - are - - - are

1 cases in which the statutes under which those people were
2 prosecuted were invalid - - - they were unconstitutional on
3 their face. There was no set of circumstances in which
4 they could be constantly applied to anyone. And they were
5 unconstitutional - - - they - - - they were unconstitutional
6 either because the conduct could not be subject to
7 licensing or the person could - - - a particular person
8 could not be subject to the licensing regime, or the
9 licensing regime incorporated a degree of discretion that -
10 - - excessive discretion that voided the entire scheme.

11 But that - - - that isn't the case here. Mr.
12 Pastrana concedes that firearms can be licensed. He
13 concedes that everyone can be subjected to those licensing
14 requirements, and he concedes that the - - - that a regime
15 that has objective criteria for issuing the - - - the
16 license is a legitimate regime. So that the only question
17 that is really left is the application of the - - - the
18 constitutionally - - - the constitutionality of applying
19 the regime in a particular set of circumstance. That's not
20 a facial challenge.

21 And so he is required to subject himself to the
22 licensing requirement in order to have standing to
23 challenge it.

24 CHIEF JUDGE WILSON: So that's - - - if there was
25 a licensing scheme that said you can't speak in public

1 unless you get a license, and you can only get a license by
2 showing proper cause, and the Supreme Court said proper
3 cause piece of that is unconstitutional, but there were
4 some other components in it so that, for example, you
5 couldn't use a amplification device over 120 decibels or
6 something, you would say he couldn't raise that as a
7 defense for his prosecution; he has to challenge the
8 licensing scheme up front?

9 MS. KOWALSKI: He has to show - - - when the - -
10 - when the statute is not unconstitutional on its face,
11 which this one was not - - -

12 CHIEF JUDGE WILSON: Well, the hypothetical one I
13 gave you; you'd say that also is not?

14 MS. KOWALSKI: I'm sorry?

15 CHIEF JUDGE WILSON: The hypothetical example,
16 hypothetical statute having to do with the First Amendment
17 - - - let's put the Second Amendment aside for a second,
18 right?

19 MS. KOWALSKI: Right.

20 CHIEF JUDGE WILSON: So the statute says it's a
21 crime, it's a felony, to speak in public without getting a
22 license. And to get a license, you have a couple of
23 conditions. And one of the conditions is you have to have
24 proper cause for your speech. Supreme Court says that's
25 unconstitutional. You say he can't raise that as a defense

1 to his criminal prosecution? He has to challenge the
2 licensing scheme because of a lack of standing?

3 MS. KOWALSKI: Yes, because he ca - - - he cannot
4 - - - he cannot show that that is the reason that he does
5 not have a license. I mean, Mr. Pastrana in particular.
6 In - - - in order to have standing to complain about the -
7 - - an unconstitutional provision, you have to show that it
8 had some impact on you.

9 CHIEF JUDGE WILSON: That's different. Because
10 then you're saying it's some other portion of the statute
11 that is disqualifying him in pers - - - in particular.

12 MS. KOWALSKI: Yes. I am - - - I am saying that.

13 CHIEF JUDGE WILSON: Okay. So it turns on that.
14 It's not - - - it's not that - - - it's not that if you
15 conceded, he otherwise qualified. And the reason he was
16 disqualified was because of the proper cause requirement he
17 would lack standing, and therefore, had to challenge it not
18 in his criminal prosecution. That's what's hanging me up.

19 MS. KOWALSKI: But we don't know that he was
20 qualified - - -

21 CHIEF JUDGE WILSON: How do we know - - -

22 MS. KOWALSKI: - - - because he never applied.
23 And - - - and honestly, translating that determination into
24 a criminal prosecution is - - - is not appropriate. The -
25 - - a criminal court is really not experienced in

1 determining whether someone - - - or let me start that
2 again.

3 Under that - - - under that path, the criminal
4 court would be put in the position of having to decide
5 whether if Mr. Pastrana had applied for a license, he
6 would've gotten one. And that's a retrospective
7 determination of a counterfactual set of circumstances,
8 it's - - - it's just not appropriately cited in a criminal
9 proceeding.

10 Moreover, not only was Mr. Pastrana - - - lacked
11 standing because of his criminal convictions invalidated
12 him under the New York statute, but the fact of his prior
13 felonies also meant that he had no Second Amendment right
14 to possess a gun anyway. Heller made it clear, or - - -
15 that a felon - - - that the Second Amendment does not
16 protect the right of felons to possess a gun or their - - -
17 felons have no right - - - Second Amendment right to - - -
18 to possess a firearm.

19 JUDGE RIVERA: But do you - - - do you also take
20 the position that if the prior felony convictions are for
21 unlicensed gun possession in public - - -

22 MS. KOWALSKI: Two of - - -

23 JUDGE RIVERA: - - - perhaps that doesn't apply?
24 Or do you think that still applies?

25 MS. KOWALSKI: Two of the - - - one of them

1 isn't, Your Honor.

2 JUDGE RIVERA: Let's take the hypothetical - - -

3 MS. KOWALSKI: One of them isn't.

4 JUDGE RIVERA: - - - only - - - either one or
5 more, the only prior felonies are for that particular
6 crime.

7 MS. KOWALSKI: He had a prior felony that was not
8 for a weapon possession.

9 JUDGE RIVERA: No, I understand that.

10 MS. KOWALSKI: So he's - - -

11 JUDGE RIVERA: I'm giving you a hypothetical.

12 MS. KOWALSKI: Okay.

13 JUDGE RIVERA: A hypothetical. A defendant whose
14 only prior felony is the unlicensed gun possession in
15 public.

16 MS. KOWALSKI: Well, again, the - - - the - - -
17 this is not the venue in which to challenge those prior
18 convictions. Those - - -

19 JUDGE RIVERA: Because you're going to have,
20 like, a - - -

21 MS. KOWALSKI: It's a - - -

22 JUDGE RIVERA: - - - mini-administrative hearing
23 in the criminal court about whether or not someone
24 should've been granted a license? Is that why? That why
25 you say it's not the appropriate venue, I guess, for it?

1 Is that what you mean?

2 MS. KOWALSKI: Your Honor, if - - - if the - - -
3 if Mr. Pastrana wanted to challenge the constitutionality
4 of those convictions, his means of doing so, I think,
5 might've been a 440 motion, in which he could've - - -
6 might've claimed that those were unconstitutional because
7 he should not have been disbarred by - - - by - - - by
8 virtues of - - - of - - - of his felony.

9 CHIEF JUDGE WILSON: Thank you, Counsel.

10 MS. KOWALSKI: We ask this court to reject Mr.
11 Pastrana's claim because it's unpreserved. He had no
12 standing. And it's meritless because Bruen did not upend
13 New York's ability to prosecute unlicensed gun possession.

14 Thank you.

15 CHIEF JUDGE WILSON: Thank you.

16 MR. ZENO: I'd like to start with what this court
17 held in People v. Hughes vis-a-vis the standard that it
18 would apply to a Second Amendment challenge. Court stated
19 at 22 New York 3d 51, we conclude that assuming any Second
20 Amendment scrutiny is appropriate here, intermediate
21 scrutiny is the right kind. That's at page 51.

22 To suggest that, in light of that language, a
23 busy trial court in New York County or the Bronx would have
24 disregarded that statement and entertained a challenge on
25 the historical grounds that Bruen later stated was the law,

1 is just - - -

2 JUDGE GARCIA: Is that the preservation
3 requirement we would impose if we were going to impose one,
4 that you had to make the argument that no, the real way to
5 do this isn't under Hughes in the intermediate scrutiny.
6 It's you have to go back to Colonial times? Or would we at
7 least require an objection based on the standard in place
8 at the time for the particular licensing application you
9 were challenging, which wasn't at issue in Hughes? So why
10 couldn't you do that?

11 MR. ZENO: Well, he could've done that, but it
12 wouldn't have helped us on appeal. That would be
13 preservation for preservation's sake.

14 JUDGE GARCIA: Well, it would've helped you - - -
15 well, there are various reasons for preservation. I know -
16 - - we're assuming it's to make a full and complete record.
17 But I don't think the only way we look at whether or not
18 you need to preserve something is what would've added to
19 the record.

20 But let's say you made that objection on this
21 particular provision of the licensing. And you lose
22 because the court applies an intermediate scrutiny test.
23 It comes up here now, and we can say, no, no, you applied
24 the wrong test, go back and do it again.

25 MR. ZENO: But what would - - - I - - - I - - - I

1 guess I'm missing, what would that serve? I mean, it
2 wouldn't present a record for this court - - -

3 JUDGE GARCIA: It would preserve an - - -

4 MR. ZENO: - - - upon which - - -

5 JUDGE GARCIA: - - - issue of law that gives us
6 jurisdiction to hear it.

7 MR. ZENO: Well, this court considers questions
8 that have not been preserved, like in mode of proceedings
9 situations, no preservation. The court has found an
10 exception there, has found that it has the jurisdiction to
11 entertain those. And the - - -

12 JUDGE GARCIA: The appli - - - but you're saying
13 - - - and now, I don't remember this argument - - -
14 application of this standard is a mode of proceeding - - -

15 MR. ZENO: No, I'm not saying that at all. I'm
16 saying that the court has authority to create exceptions to
17 the preservation statute. And this is one that the court
18 created in Patterson and in Baker. And - - -

19 JUDGE GARCIA: This would be really a unique
20 exception - - -

21 MR. ZENO: It's not a unique exception. It comes
22 up once in a generation. When - - - when the Supreme Court
23 upends the law that applies to - - - to an important
24 question in criminal procedure or criminal substantive law.
25 It's an unusual exception. It - - - it would certainly not

1 be applied every day. But that doesn't mean it isn't - - -
2 it shouldn't exist. Patters - - -

3 JUDGE HALLIGAN: Counsel - - -

4 MR. ZENO: Yes?

5 JUDGE HALLIGAN: Sorry. Go ahead.

6 MR. ZENO: No, please.

7 JUDGE HALLIGAN: What about the Attorney
8 General's comment that there were enough signposts,
9 breadcrumbs, whatever you want to call them, given what was
10 happening in some other jurisdictions that it was
11 reasonable to expect some argument?

12 MR. ZENO: Again, I return to the - - - the fact
13 that the First Department had held against - - - had held
14 against us on this issue that in Hughes, in 2013, post-
15 Heller, this court said intermediate scrutiny applied, that
16 every circuit court, every federal circuit court to have
17 reached the question, found that intermediate scrutiny
18 applied. It was universal. Yes, there were dissenting
19 voices out there. But to impose that requirement on a
20 trial lawyer in Part 22 in - - - in Bronx Supreme Court, to
21 make - - - to anticipate these arguments that are appearing
22 in law review articles, not in courts - - - no court is
23 saying that's the rule that applies - - - that's an
24 unreasonable standard to hold busy trial lawyers to.

25 JUDGE HALLIGAN: What about before the Appellate

1 Division?

2 MR. ZENO: Before the Appellate Division?

3 JUDGE HALLIGAN: Right, that was later, right?

4 MR. ZENO: I guess I'm not sure what your
5 question - - - I mean, this case - - - Bruen was decided
6 after Mr. Pastrana's appeal was affirmed in the Appellate
7 Division.

8 JUDGE HALLIGAN: It - - - it was. But I think it
9 might have been more apparent at that juncture that there
10 were meaningful questions about what Heller meant with
11 regard to the applicable legal framework.

12 MR. ZENO: Well, for one thing, that would create
13 an entirely new requirement of appellate preservation which
14 has never existed before in this state and has - - - has no
15 grounding in the CPL.

16 JUDGE HALLIGAN: I'm just - - -

17 MR. ZENO: So - - -

18 JUDGE HALLIGAN: - - - asking whether it - - - it
19 would've been reasonable to think you might have raised the
20 issue sooner than - - - than before this court. I take
21 your point.

22 MR. ZENO: Again, I return to the fact that this
23 court - - - the Appellate Division has binding precedent
24 from this court saying, assuming any Second Amendment
25 scrutiny is appropriate here, intermediate scrutiny is the

1 right kind.

2 JUDGE SINGAS: But do you think the - - -

3 JUDGE RIVERA: But is that in part - - - sorry.

4 Is that in part because it's intermediate scrutiny also - -

5 - even though, of course, it's not strict scrutiny? It's

6 more than rational basis. Is part of this argument that

7 you're making driven because if you can survive that kind

8 of scrutiny, you're likely not going to survive a higher

9 level of scrutiny? On a test that seems to impose - - -

10 MR. ZENO: Scrutiny.

11 JUDGE RIVERA: - - - a higher level of scrutiny -

12 - -

13 MR. ZENO: Right.

14 JUDGE RIVERA: - - - than this - - - this obvious

15 lower level of scrutiny than - - - than strict scrutiny?

16 MR. ZENO: Right. And it's not even scrutiny at

17 all, in my mind. It's just whether it's grounded in

18 historical precedent. It - - - it - - - and the idea that

19 the Appellate Division might have, you know, decided to go

20 its own way when there's binding precedent from this court,

21 which it is required to follow, would've served no purpose

22 - - -

23 JUDGE RIVERA: Oh, so then I misspoke, I'm sorry.

24 So the argument being that if - - - if you can't survive

25 strict scrutiny, as you see it, the other test is one

1 that's even easier - - - excuse me - - - is harder to make
2 up for a - - - for the People? Am I getting this right?

3 MR. ZENO: Which test is harder to make up - - -

4 JUDGE RIVERA: I'm sorry. The historical - - -
5 the historical basis for - - -

6 MR. ZENO: The historical is much harder for the
7 People to make out, yes. It's an entirely different test
8 than - - - than that intermediate strict scrutiny regime.
9 It's entirely different than that. And if I can - - -

10 JUDGE RIVERA: But - - - but not just different?
11 More difficult?

12 MR. ZENO: Again, different. I - - - I don't
13 think more difficult is the right - - - is the right
14 description.

15 JUDGE SINGAS: But the Supreme Court also
16 referenced a record. They want a record being made. And
17 is it your position that it's this court's job to create
18 that record of historical significance?

19 MR. ZENO: No. And in fact, I suggest in our
20 briefing that it should be sent back for a - - - for an
21 assessment of whether - - - of whether there is historical
22 precedent for - - - for these other qualifications under
23 the licensing law that were not raised below. So no, I - -
24 - I don't think that should be made by this court.

25 If I could address another of the Second

1 Amendment arguments that came up - - -

2 CHIEF JUDGE WILSON: Just very briefly, Mr. Zeno

3 - - -

4 MR. ZENO: Sure.

5 CHIEF JUDGE WILSON: - - - because you're out of
6 your time.

7 MR. ZENO: Yes. The argument was made that the
8 Supreme Court has endorsed felony disenfranchisement broadly.
9 That - - - that's not the case. If you look at *Range v.*
10 *Attorney General*, which Judge Garcia mentioned, you look at
11 it felony by felony. In that case, it was in offering a
12 false statement. In this case, it would be prior
13 possession of a weapon which New York categorizes as
14 violent. I don't think Judge Thomas necessarily would
15 categorize that as a violent crime. He might categorize it
16 as exercising your Second Amendment right.

17 And the other offense that my client was
18 convicted of was possessing prison contraband. We would
19 have to look if - - - to see if there was a historical
20 precedent at the time of the enactment of the Bill of
21 Rights or the due process clause that supported disarming
22 people who have promoted prison contraband. You can't just
23 say felony disenfranchisement; you need to look at the
24 individual offense of conviction.

25 CHIEF JUDGE WILSON: Thank you.



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MR. ZENO: Thank you.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Terry Hodges, certify that the foregoing transcript of proceedings in the court of Appeals of People of the State of New York v. Pablo Pastrana, No. 63, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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