1 COURT OF APPEALS

2 STATE OF NEW YORK

3 --
THE PEOPLE OF THE STATE OF NEW YORK,

4 Respondent,

5 -against- No. 65

6 RAMON CABRERA,

7 Appellant.

8 --

9 20 Eagle Street
Albany, New York
10 September 13, 2023
Before:

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

15

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Christy Wright
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1 CHIEF JUDGE WILSON: Okay. We are back for more,
2 and it's People v. Cabrera, Number 65.
3 MS. ZOLOT: Yes. I'd like to reserve five
4 minutes for rebuttal, please.
5 CHIEF JUDGE WILSON: Five?
6 MS. ZOLOT: Yes. May it please the court.
7 Barbara Zolot for appellant, Ramon Cabrera. I'd like to
8 begin by addressing the Miranda point. When Mr. Cabrera
9 was handcuffed, he was placed in Miranda custody. Indeed,
10 the fact that handcuffs put someone into custody seems
11 almost too obvious a point to require extended discussion.
12 JUDGE SINGAS: So are you arguing for a per se
13 rule on handcuffing?
14 MS. ZOLOT: Yes, Your Honor, we are.
15 JUDGE SINGAS: And is that preserved?
16 MS. ZOLOT: Yes, that is preserved. Below
17 defense counsel said that when someone is handcuffed with
18 three officers around them, they are in custody, and then
19 very significantly, the prosecution joined issue on the
20 exact question of whether handcuffing puts someone into
21 custody - - -
22 JUDGE CANNATARO: Would a per se rule cover a
23 situation where some - - - where an officer handcuffs
24 someone, but specifically said, you're not under arrest, we
25 just have to - - - I don't know, secure this thing or

1 whatever. Would that be vitiated by a - - - by a per se
2 rule, or - - -
3 MS. ZOLOT: No, Your Honor. We would still say
4 the per se rule is the correct rule because handcuffing is
5 so overwhelmingly a severe restraint and coercive, that
6 even those sorts of factors, and I'll add that in United
7 States against Newton, the Second Circuit considered
8 situations like that, and said, no. When a person is
9 handcuffed, the handcuffing is such a severe restraint that
10 they're not going to believe they are free to leave simply
11 because the officers might make some comment that, you
12 know, arguably vitiates it somewhat.
13 JUDGE RIVERA: Well, you'd have to leave with the
14 handcuffs on.
15 MS. ZOLOT: Excuse me?
16 JUDGE RIVERA: They'd have to leave with the
17 handcuffs on.
18 MS. ZOLOT: They'd have to leave with the
19 handcuffs on. And the only thing a reasonable person could
20 believe when they're handcuffed is that the police have no
21 intention of letting them walk away. And I'll also add
22 that this court has framed sort of an alternative test for
23 custody in People against Alls, and People against Bennett,
24 following the Supreme Court's lead in cases like Quarles
25 and Beheler, asking whether the restraint - - - whether the

1 restraint imposes - - - curtails the freedom of movement to
2 the degree associated with a formal arrest. And we all
3 know, and we cite multiple cases in our brief, that
4 handcuffing is the signature hallmark and trapping of an
5 arrest. So - - -
6 JUDGE HALLIGAN: Counsel, do you read Newton, or
7 any other cases as imposing a per se rule, as opposed to
8 saying, you know, it may - - - may be necessarily given
9 significant weight, the formal, you know, hallmark,
10 etcetera?
11 MS. ZOLOT: Newton doesn't come out and declare a
12 per se rule. That's true. But I think it comes as close
13 as you could possibly come without declaring a per se rule.
14 It all but did because it did have these arguably
15 countervailing factors. There I believe it was that the
16 police told Mr. Newton that he was not under arrest. You
17 could have these countervailing factors, and nonetheless,
18 Newton looked at handcuffing and said that outweighs, that
19 controls the analysis.
20 So while Newton didn't declare a per se rule, I
21 think it's very, very strong authority. I'd also add that
22 this court's no stranger to per se rules. I'd like to
23 point this court to People against Shivers, where this
24 court held in a nonarrest detention that holding someone at
25 gunpoint puts them in Miranda custody. This court didn't

1 look at any other factors. A gunpoint detention puts an
2 individual into Miranda custody. And the same concerns
3 that this court expressed in Shivers are very much present
4 here, very severe restraint where the suspect - - - and of
5 course Fifth Amendment custody is viewed from the
6 perspective of the suspect, would never believe they were
7 free to leave with a gun pointed at them or when they are
8 handcuffed and physically unable to walk away, and that
9 this is a very coercive restraint that's likely to overcome
10 or runs the risk of overcoming a person's will to resist.
11 So a per se rule is the appropriate rule here.
12 It's the right rule for this state. It really benefits the
13 state and the accused, because it provides law enforcement
14 with certainty about how to behave in the field. They will
15 know that rather than engage in some freewheeling balancing
16 test in the moment, if they choose for safety reasons,
17 which may well be reasonable under the Fourth Amendment,
18 that's a separate inquiry. But if they choose for safety
19 reasons to handcuff someone, then they, before engaging in
20 interrogation, would need to administer Miranda warnings -
21 - -
22 JUDGE TROUTMAN: So assuming for the sake of
23 argument that you are correct in this particular
24 circumstance, that he was in custody, the next question is
25 what happens to his statements?

1 MS. ZOLOT: His statements are - - - because he
2 was not Mirandized in this case and no exception exists in
3 this case to excuse the failure to Mirandize, the
4 statements are suppressed in this case, as well as the guns
5 that were recovered as a result of those statements.
6 CHIEF JUDGE WILSON: Well, so let me ask you
7 about the guns - - - sorry. Because an ATF agent called
8 and told New York police that he had guns in the car, and
9 that's why they interdicted him, you know, they knew where
10 he was going and they stopped him. So is there an
11 independent source?
12 MS. ZOLOT: Well, that was never argued below,
13 and I believe if - - - if Your Honor is getting it like
14 inevitable discovery, the guns would be the primary
15 evidence, and inevitable discovery doesn't address primary
16 evidence. But again, that was never argued by the
17 prosecution.
18 JUDGE HALLIGAN: What about the written consent
19 at the station house?
20 MS. ZOLOT: Well, that fails for at least two
21 reasons.
22 JUDGE HALLIGAN: If we were to think that that
23 was voluntary, would that cure - - - and I understand your
24 view is that it's not, but - - - but would that cure the -
25 - - if - - - if he was in custody, would that cure with

1 respect to the guns?

2 MS. ZOLOT: No, under the sort of Chapple

3 analysis because there's no real, like, break in the taint

4 from the initial illegality in obtaining the statement and

5 the consent that followed, and the - - -

6 JUDGE TROUTMAN: Well, what about the fact that

7 it was an hour and a half later that he gave the consent.

8 He was no longer cuffed, and he was specifically told he

9 didn't have to speak to them?

10 MS. ZOLOT: Well, it - - - he was cuffed up until

11 that point of course. The cuffs were removed once he was

12 at the precinct, but it was in a - - - it was conducted by

13 these same officers. You know, many of the factors that we

14 look to for attenuation, there really are none that would -

15 - - would allow for attenuation here. It was the same

16 officers who were involved.

17 JUDGE GARCIA: Counsel, at that point, had they

18 already looked in the trunk?

19 MS. ZOLOT: They - - -

20 JUDGE GARCIA: At the point where he gives

21 consent at the station?

22 MS. ZOLOT: Well, they - - - they had looked in

23 the trunk after he had given his consent, seen a stock of a

24 rifle - - -

25 JUDGE GARCIA: And they found a gun there, right?

1 MS. ZOLOT: But they went back and conducted the
2 search only after he had given his written consent.
3 JUDGE GARCIA: My point, I guess is a little bit
4 different. It's that at the time he gives the consent at
5 the station, he's already - - - he knows they've already
6 looked in there and seen a gun, right?
7 MS. ZOLOT: Well, that could equally say that he
8 had no choice but to - - -
9 JUDGE GARCIA: No, that's the point.
10 MS. ZOLOT: Yeah, he had no choice but to give -
11 - -
12 JUDGE GARCIA: The cat's already - - -
13 MS. ZOLOT: The cat out of the bag, essentially.
14 JUDGE GARCIA: Yeah.
15 MS. ZOLOT: Yes, yes.
16 JUDGE TROUTMAN: And with respect to what the
17 police officer from the other state said, it wasn't ruled
18 on by the court, correct? If - - - if we were to say that
19 you're correct - - -
20 MS. ZOLOT: Right.
21 JUDGE TROUTMAN: - - - and we suppress the
22 statement and the guns, do the People get an opportunity to
23 go back and have the court address that which there was no
24 ruling on?
25 MS. ZOLOT: I'm sorry. Address which issue?

1 JUDGE TROUTMAN: The issue with respect to
2 whether there was probable cause based upon the police
3 telling them that he was coming to New York?
4 MS. ZOLOT: Well, the People below argued that -
5 - - they argued - - - really, they limited themselves to
6 arguing that there was reasonable suspicion to stop Mr.
7 Cabrera. I believe they also did argue that there was
8 actually probable cause.
9 JUDGE TROUTMAN: Right, but the - - - did the
10 court rule on that? That's the point.
11 MS. ZOLOT: I see. The court found that there
12 was reasonable suspicion, but it had the opportunity to
13 rule on probable cause, so I - - - I can't see why the
14 People would get a second bite at the apple here.
15 Everything - - - these arguments were put to the hearing
16 court - - -
17 JUDGE TROUTMAN: But you agree the court didn't
18 specifically rule on that which they asked, at least one
19 part of it, for argument?
20 MS. ZOLOT: Yes. I, you know, I'm sorry to say,
21 I don't recall if the court specifically ruled on probable
22 cause. I know that they - - - the court found that there
23 was certainly reasonable suspicion. But I, again, do not
24 believe everything having been put forward to the hearing
25 court, that they get a second bite at the hearing court

1 deciding an issue that was litigated. I don't think
2 LaFontaine works in the reverse so to speak, because the
3 court didn't address it for the People. Now, it can go
4 back to the hearing court for - - - for review of that
5 issue.
6 JUDGE CANNATARO: What's the remedy for this
7 particular violation? Does he get his plea back now?
8 MS. ZOLOT: Well, because the guns - - - because
9 he was convicted of weapon possession, and the guns are
10 what he was convicted of possessing, would be dismissal in
11 this case. All the guns would be suppressed as a result of
12 this - - - of this - - - of the Miranda violation and the
13 recovery of the guns as a result.
14 JUDGE TROUTMAN: Even if - - - if for the sake of
15 argument, there were a determination that the statement
16 should be suppressed, but there was enough to find consent
17 on the second part, would he still be able to at least
18 withdraw his plea?
19 MS. ZOLOT: Yes. If - - -
20 JUDGE TROUTMAN: Or should they permit it?
21 MS. ZOLOT: - - - at a minimum - - - at a
22 minimum, he's entitled to plea withdrawal under People
23 against Grant, plea vacatur under People against Grant, but
24 you know, the consent itself is a fruit. You know, you
25 understand our arguments on that front. Everything goes.

1 I see the remaining minute, and then on rebuttal,
2 I would turn to the Bruen arguments that are specific to
3 Mr. Cabrera. And in that regard, I want to first stress a
4 very important point here that Mr. Cabrera held a Florida,
5 a valid Florida concealed carry license. That's
6 undisputed.
7 And that fact largely dispenses with the State's
8 argument that Mr. Cabrera has no valid constitutional
9 complaint on the theory that he could've been denied on
10 some basis other than probable cause on the basis of some
11 other theoretical lawful licensing provision in the
12 licensing scheme that applied at the time. They don't
13 actually identify which provision that would be, and so he
14 would've suffered the same penalty of arrest, prosecution,
15 conviction, and a four-and-a-half-year sentence.
16 JUDGE TROUTMAN: So New York - - - are you saying
17 that New York was required to just accept that he had a
18 Florida license?
19 MS. ZOLOT: What we're saying - - - that's not
20 the argument, Your Honor. What we're saying is that
21 because he had a valid Florida license, which is
22 undisputed, he satisfied the objective requirements - - -
23 the rigorous objective requirements of Florida's shall
24 issue regime, which included that he had no felony, or
25 actually, any criminal convictions, no history of mental

1 illness, no history of alcohol or substance - - -
2 JUDGE GARCIA: Was there a residency requirement?
3 Do you - - -
4 MS. ZOLOT: For Florida's concealed - - -
5 JUDGE GARCIA: No, for New York?
6 MS. ZOLOT: New York has a residency requirement
7 for even applying for a license.
8 JUDGE GARCIA: Right.
9 MS. ZOLOT: It's not within the general
10 eligibility - - -
11 JUDGE HALLIGAN: Where in the statute do you see
12 that?
13 MS. ZOLOT: That is in 400.00 sub (3) in that it
14 only - - - and cert - - - district courts that have
15 considered challenges to the residency requirement
16 corroborate this. It only allows an extremely narrow
17 exception for people who - - - where their principal place
18 of employment is in New York. The record does not - - -
19 the People certainly haven't argued that Mr. Cabrera's
20 principal place of employment was in New York. In fact, he
21 held a Florida driver's license. He gave a Florida
22 address. He would have been - - - to the extent we've
23 turned to sort of the residency issue, he would - - - New
24 York's licensing statute effectively disarmed him
25 completely from even applying for a license.

1 JUDGE TROUTMAN: And how did Bruen effect - - -
2 MS. ZOLOT: Yes.
3 JUDGE TROUTMAN: - - - the structure in New York?
4 MS. ZOLOT: Well, that - - - now, turning to the
5 residency, that disqualification, that disarming of any
6 nonresident, even those who hold valid licenses, who have
7 complied with the constitutionally compliant schemes of
8 their states, Bruen would demand that the People show a
9 national historical tradition of completely banning
10 nonresidents from even applying for licenses. Mr. Cabrera
11 had no lawful path to avoiding criminal prosecution for
12 possessing a gun in New York because he was banned even
13 from applying for a license. So Bruen - - -
14 JUDGE GARCIA: Well, I think he could come to the
15 state without a gun and then apply for a license, right?
16 MS. ZOLOT: He could arguably come, but that's
17 forcing him to choose, which kind of pivots to our
18 privileges and immunities argument. That's forcing him to
19 choose between his fundamental right to travel to New York
20 and other states and exercise his Second Amendment rights
21 in New York, subject to lawful regulation. Because New
22 York completely disarmed nonresidents from ever having that
23 lawful path, he couldn't even make that choice.
24 JUDGE RIVERA: The record is clear that he's a
25 nonresident? That's not in dispute?

1 MS. ZOLOT: It - - - my adversary has disputed
2 it. We believe the record provides adequate proof - - -
3 ample proof to conclude that he was a resident. As I said,
4 he held a valid New York - - - valid Florida driver's
5 license. He gave his address as a Florida address on the
6 rap sheet that was used on the vouchers in this case. He
7 said he was going to his mother's house. But a point I do
8 want to make is that between the robust record we have,
9 that Mr. Cabrera would have satisfied the at least lawful
10 remaining provisions that Bruen didn't directly invalidate,
11 because he was - - - he had satisfied Florida's objective
12 provisions which Bruen approved of. Between that robust
13 record and the evidence we have that he was not a resident,
14 at a minimum, this is the kind of case that should be
15 remitted for further fact finding. Because if Mr. Cabrera
16 could show that he could satisfy the other lawful
17 provisions - - - other lawful provisions of New York’s
18 scheme, he should not be prosecuted for - - - for weapon
19 possession.
20 JUDGE CANNATARO: Before you go, can you speak to
21 your preservation argument with respect to this very
22 compelling constitutional claim?
23 MS. ZOLOT: Well, in a way, I'll just be
24 repeating what others have said. I could, you know, but
25 it's - - - there is a futility exception. And with respect

1 to some of the points that were made, as far as Patterson
2 goes, there was this claim, oh, that was just about mode of
3 proceedings, that's what that case was about. Well, the
4 reason why Patterson spent so much time on mode of
5 proceedings was because that was like a brand new concept
6 that the court was introducing. When it was talking about
7 futility, it was just restating a rule it had previously
8 held in Baker, with respect to Bruton, which was not a mode
9 of proceedings error. And it also relied on O'Connor v.
10 Ohio, which Baker also favorably cited, which is very
11 significant. That's a Supreme Court case where the Supreme
12 Court, in fact - - - it gets kind of involved, but there
13 was Griffith v. Ohio which talked about comments on a
14 defendant's right to silence.
15 JUDGE GARCIA: But it seems like a futility
16 argument is too - - - it's a complicated one here, because
17 there's the futility of arguing a specific issue we've
18 decided. So if you were going to argue the misdemeanor
19 enhancing the home possession, we did that. We applied the
20 old standard, and we said no. As far as I know, we've
21 never decided the constitutionality of the residency
22 requirement under the old standard. So we have to take it
23 a step further and say, it would've been futile to apply -
24 - - to make that argument because the old standard you
25 would've lost. That's different to me than saying it's

1 futile because this court has decided something.
2 MS. ZOLOT: It's a more subtle argument, but at
3 the same time, we know that under the law that had
4 addressed the residency requirement, Bach v. Pataki, for
5 example in the Second Circuit, it was all decided under
6 means-end scrutiny. It was the same thing. Means-end
7 scrutiny was like the go-to for deciding any objection to
8 New York's licensing scheme and - - -
9 JUDGE GARCIA: But we would've had some record if
10 that had been done. We would've perhaps even had the
11 residency record, right?
12 MS. ZOLOT: Arguably, yes. But I think that, you
13 know, given how Bruen upended the - - -
14 JUDGE GARCIA: But it's not the upending I think
15 you're relying on. It's the - - - it's the - - - that it
16 wouldn't have made any difference. It's a futility
17 argument, right? Bruen upended a lot of things, but it's
18 the futility argument that gets you by preservation. And I
19 just think it's a very different argument on futility to
20 say we've already decided the issue than to say, well, the
21 test is different now.
22 MS. ZOLOT: Even - - -
23 JUDGE GARCIA: Because let's say they did this in
24 another context and there used to be rational basis. Now
25 it's intermediate scrutiny, anyone can come in and say if

1 you fall within the new test, well, we didn't have to
2 preserve a challenge to this because it was an old test,
3 and we would've lost.
4 MS. ZOLOT: Well, even if I - - - if we agreed
5 with Your Honor that this is somehow different, remember
6 that Mr. Cabrera was still injured by the proper cause
7 requirement, and you know - - - so that's very much subject
8 to futility.
9 JUDGE GARCIA: Again, that was never litigated
10 here either, right?
11 MS. ZOLOT: Well, in any of these cases it wasn't
12 litigated, but that's where the Appellate Division binding
13 law, you know, is very relevant because it would've barred
14 any challenge.
15 JUDGE GARCIA: But is it futility because of an
16 Appellate Division decision, or is it futility because of
17 us or the Supreme Court?
18 MS. ZOLOT: I think it operates at both levels.
19 JUDGE HALLIGAN: So litigants do make arguments
20 to the Appellate Division hoping to have this court, or
21 even the Supreme Court, take them on and reach a different
22 conclusion.
23 MS. ZOLOT: Well, but playing that out, there
24 would've been no point in making the argument in the trial
25 court because of the binding Appellate Division laws. So

1 any argument made in the Appellate Division, even if the
2 appellate lawyer had wanted to be creative, would then be
3 entirely unpreserved, so it's not going to reach the Court
4 of Appeals anyway. It's sort of, in itself, an exercise in
5 futility. It's going to - - - it's going to end in the
6 Appellate Division, and again, there would've been no - - -
7 it would've been futile to address it in the trial court
8 because of the binding Appellate Division law.
9 JUDGE CANNATARO: Can't argue for a change in the
10 law in the - - - in the trial court?
11 MS. ZOLOT: Well, the trial court has no power to
12 really overrule - - -
13 JUDGE GARCIA: But again, it's different here
14 because it's not the issue that's been decided. It's the
15 standard that's been changed. So you could make some
16 record for us by objecting under the old standard which
17 hasn't been decided. We have never applied that standard
18 to this issue. Let's use the residency requirement. So if
19 you make an objection under the old standard, you develop a
20 record in terms of residency, yes resident, not resident.
21 It comes up the standard change is, well, you've preserved
22 it and we have some indication in the record, but now it's
23 just, well, I would've lost because it's a new standard,
24 you never decided. That's a different futility argument.
25 MS. ZOLOT: Well, two points there. First, I

1 mean, the validity of the proper cause standard at least
2 had been directly decided by the Appellate Division, had
3 been validated by the Appellate Division. But - - -
4 JUDGE GARCIA: That finality exception is very
5 narrow. I mean, this futility exception. So we would - -
6 - do we have a case where we've said you don't need to
7 preserve on fin - - - on futility grounds where the
8 Appellate Division has decided?
9 MS. ZOLOT: I'm not aware of that case, but as to
10 the standard question, I think the - - - it's still futile
11 because of this court's decision we keep coming back to
12 Hughes, but Hughes was decided after Heller and applied
13 means-end scrutiny - - -
14 JUDGE HALLIGAN: Couldn't you have argued that -
15 - - and you made some points yourself about the impact, in
16 your view, that this requirement would have on your client,
17 who did have a license elsewhere. Couldn't you have argued
18 that specifically, were we to read the statute, and I think
19 there are contrary arguments that your adversary makes to
20 not allow a license except in these narrow circumstances to
21 nonresidents, that that didn't need to pass means-ends test
22 that was set forth in Hughes.
23 MS. ZOLOT: I still don't see the point of making
24 a means-end argument when - - - even on other grounds,
25 where New York State has been so overwhelmingly clear that

1 these arguments are not going to succeed, applying means-
2 end scrutiny. So I think there is, you know, the futility
3 of Hughes having adhered to the means-end rubric. There's
4 the futility of making arguments that a trial court is
5 bound to reject because of controlling precedent. And then
6 there's the futility of - - - there's actually also the
7 point of should we be incentivizing trial lawyers to be
8 making arguments that are bound to fail just so that they
9 are technically preserved without making a useful record
10 for a higher court.
11 JUDGE RIVERA: On their point, it's well taken, I
12 think, the point that if there's Appellate Division binding
13 law that to request a trial judge to consider an argument
14 that clearly has been rejected by the Appellate Division
15 does seem futile, but then it does seem under the
16 preservation rule that your first opportunity is at the
17 Appellate Division. And then the question remains, why not
18 then present it at the Appellate Division.
19 MS. ZOLOT: Well, I - - -
20 JUDGE RIVERA: The request is to allow the court
21 that can, of course, change its rule, overturn its rule, is
22 the one that's hearing the argument.
23 MS. ZOLOT: Well, I could give Your Honor - - -
24 JUDGE RIVERA: This is like what Judge Garcia was
25 saying, well, if we haven't decided it, what would - - -

1 what would be the obstacle at least preservation wise?
2 MS. ZOLOT: I mean, I - - -
3 JUDGE RIVERA: We don't have to preserve. What
4 would be the obstacle to present the argument because we
5 haven't decided?
6 MS. ZOLOT: I can give Your Honor a sort of
7 concrete example of what's flowed since Bruen to give you,
8 sort of, more like, sort of a realistic sense of how these
9 things might play out, which is post Bruen, in cases where
10 the arguments were not made in the trial court. Appellate
11 lawyers have been raising Bruen, you know, Bruen arguments
12 in the Appellate Division, at least in the First
13 Department. The way these have gone is this is unpreserved
14 at the trial level, and we otherwise find it without merit.
15 There is not any kind of, you know, exploration of the
16 arguments, or vetting of the arguments, that were made to
17 the Appellate Division, so you know, I don't want to, you
18 know, keep using the word futility, but there's an aspect
19 of futility there, the argument is unpreserved and
20 therefore, we can't get it to the Court of Appeals, and the
21 Appellate Division is reluctant, and you know, busy docket
22 of its own, to start doing this broad investigation of
23 these arguments in an unpreserved case. So that isn’t
24 really a path to vetting these arguments.
25 JUDGE RIVERA: It's just - - - it is just a delay

1 because - - - so you're right. It is just a delay. At
2 some point, which I think was the point to one counsel for
3 the attorney general. There've been several who tried to
4 make, which is there will be cases where it is preserved,
5 and those are the appropriate cases in which to consider
6 the issues.
7 MS. ZOLOT: Well, they may be preserved cases,
8 but if our client’s, if my client's conviction is a
9 wrongful conviction because of Bruen's invalidation of
10 proper cause and how my client was injured from that, and
11 if as we've argued there is a futility exception based on
12 intervening Supreme Court law, it would be an injustice not
13 to give him at least an opportunity to fully establish that
14 his conviction was wrongfully obtained by allowing him to
15 develop the record that really there was no reason in the
16 world, realistically speaking, for the parties to develop
17 below before Bruen.
18 JUDGE CANNATARO: Counsel, can I go back to - - -
19 JUDGE SINGAS: Have any of these arguments been
20 made - - - I'm sorry, pursuant to 440.10? Are you aware of
21 any of those arguments being made, and could you have made
22 that pursuant to 440?
23 MS. ZOLOT: Based on applicable First Department
24 law, which is where we practice, there is case law that
25 would bar us from bringing the 440 in part for the - - -

1 for the absence of preservation. This came up after
2 Carpenter was decided. We attempted to bring 440.10s based
3 on this sort of change in the law, and there was a
4 procedural bar based on the absence of preservation. We
5 would love to bring 440.10s in these cases, but at least,
6 as of now, there is a First Department case that prevented
7 us from - - - from pursuing that path.
8 JUDGE RIVERA: But someone could appeal that?
9 MS. ZOLOT: Someone attempted to appeal it.
10 JUDGE RIVERA: If we have not - - - if we have
11 not ruled on that - - - whether or not that preservation
12 determination's correct.
13 MS. ZOLOT: As it stands now, that is the binding
14 law in the First Department, yes.
15 JUDGE CANNATARO: I just want to go back to the
16 residency requirement for one second - - -
17 MS. ZOLOT: Yes.
18 JUDGE CANNATARO: - - - because I did take a look
19 at 403, which has language that says, "An application shall
20 be made, as the case may be, where the applicant resides,
21 is principally employed, or has his or her principal place
22 of business as a merchant or storekeeper, and in the case
23 of a license as a gunsmith or dealer in firearms, to the
24 licensing officer where such place of business is located".
25 So it certainly restricts the bringing of license

1 applications to certain classes of people, it sounds like
2 in the place where they live, or in the place where they
3 have a business, but it doesn't specifically say that if
4 you don't fall under any of these conditions that you can't
5 apply for a license, which sent me back to Section 400,
6 which are the general eligibility requirements for who can
7 get a license, and there's nothing there about being within
8 the state or a particular county. So I'm not sure exactly
9 what the basis is of your argument that 403 restricts
10 residency in the way you said.
11 MS. ZOLOT: Right, well, courts have interpreted
12 the licensing scheme in response to challenges made in the
13 civil context to this - - - these licensing - - - to the
14 residency restriction where people have been denied
15 licenses, or want to get licenses, and they're denied
16 because they are nonresidents. And one case in particular,
17 I know my adversary cited the Osterweil case for the
18 propo - - - which actually held that part-time resident
19 property owners can apply for a license even if they're not
20 domiciled in New York.
21 But there was a district court case before this
22 court decided Osterweil, which discussed the licensing
23 requirements in the context of residency and said very
24 plainly that subject to very narrow - - - not as just a
25 matter of venue where you applied, but subject to very

1 limited restrictions, exceptions, meaning it's your
2 principal place of employment, nonresidents have no access
3 to applying for a New York license. That's what - - - how
4 the courts have interpreted the licensing scheme.
5 And the fact that in the prior argument, the
6 attorney general is almost tacitly admitting that, well, we
7 need to construe it consistent with the Constitution. That
8 may well be fine going forward, but that doesn't answer how
9 the licensing scheme was interpreted when Mr. Cabrera
10 would've needed to apply for a license.
11 JUDGE HALLIGAN: But he didn't attempt to get a
12 license, right? I mean, we don't know how it would've been
13 interpreted in your client's case because he didn't seek to
14 get one and present that question, if I'm understanding the
15 record.
16 MS. ZOLOT: Well, it would've been futile for him
17 to attempt to get a license because - - - and in fact, Bach
18 v. Pataki, where one of these challenges to the license - -
19 - to the residency restrictions was made, Bach v. Pataki
20 said you don't have to first try and apply because it would
21 be futile. It would be a totally futile gesture.
22 JUDGE HALLIGAN: But - - - but it seems to me
23 that to the extent the attorney general is arguing for a
24 different reading, and one that does not impose a residency
25 requirement, couldn't your client have tested that by

1 actually applying? I'm not asking specifically with regard
2 to preservation, but we don't know the answer to the
3 question, in part, because there was no effort made to get
4 a license here, right?
5 MS. ZOLOT: That's true. There was no effort to
6 get a license, but again, it feels sort of circular because
7 if Bach v. Pataki sta - - - if it's absolutely futile to
8 attempt, then why would someone be motivated to attempt to
9 get one only to lodge a challenge to it when it's been held
10 to be a valid restriction already? I mean, we've come back
11 to futility, again. And again, this, you know, my client
12 having suffered a criminal conviction is under no
13 obligation to first apply for a license, coming back to the
14 idea of standing, where he can raise his constitutional
15 challenges as a defense to the criminal prosecution. Thank
16 you.
17 CHIEF JUDGE WILSON: Thank you, Counsel.
18 MR. WEISS: Good afternoon, Your Honors. May it
19 please the court, my name is ADA Joshua Weiss on behalf of
20 the Bronx District Attorney's Office, appearing for
21 respondent. The suppression claims rejected by the courts
22 below all presented mixed questions of law and fact that
23 this court does not have the jurisdiction even to consider.
24 This is because the record below supports the lower court's
25 finding that defendant was not in custody for Miranda

1 purposes when police stopped him outside his mother's
2 residence and briefly questioned him about whether he was
3 armed.
4 CHIEF JUDGE WILSON: Well, Counsel, were we to -
5 - - sorry, over here. Were we to adopt a rule that
6 handcuffing automatically is custody, I don't see what the
7 mixed question would be.
8 MR. WEISS: Your Honor, well, preliminarily, the
9 request for a per se rule is entirely unpreserved in
10 these - - - in the submissions before the suppression
11 court. Defendant based his arguments on acceptance of the
12 existing legal framework that a determination of custody
13 requires consideration of all the relevant circumstances,
14 but beyond that, a per se rule would unduly hamper the
15 ability of law enforcement to exercise discretion to take
16 appropriate safety measures when encountering dangerous - -
17 - dangerous situations. Handcuffed - - -
18 CHIEF JUDGE WILSON: Why is that? Why is that?
19 MR. WEISS: I'm sorry, Your Honor.
20 CHIEF JUDGE WILSON: Why is that? I mean, if
21 the - - - if an officer is facing a dangerous situation
22 that would, you know, and that person's - - - officer's
23 judgment would require handcuffing, the officer could
24 handcuff the person and just either Mirandize the person,
25 or not ask any questions.

1 MR. WEISS: Understood, Your Honor. But certain
2 situations don't - - - don't lend - - - don't lend
3 themselves well to that sort of methodical process of
4 arresting and advising. Oftentimes police officers are
5 confronted by volatile and fast pace - - -
6 JUDGE GARCIA: You didn't argue public safety
7 here, right? You didn't argue public safety exception,
8 right?
9 MR. WEISS: No, Judge. No, Judge Garcia, we
10 didn't argue public safety here. It's - - - it's our
11 position that public safety would require the existence of
12 probable cause. And here I submit that the police didn't
13 have probable cause when they encountered defendant outside
14 his - - -
15 JUDGE TROUTMAN: But even here, if you look at
16 the facts without the bright-line rule, a reasonable person
17 under these circumstances, you're saying this defendant
18 cuffed, and the circumstances surrounding that cuffing, he
19 would think that he was free to just walk away?
20 MR. WEISS: Absolutely not, Your Honor. However,
21 the standard for assessing a defendant's custodial status
22 is far more nuanced than that. It requires not only
23 looking at whether - - - not only - - - not - - - it
24 requires assessing not only whether the person is free to
25 leave, but courts also have to evaluate the surrounding

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1 circumstances that surround the interrogation. And that -
2 - - and this - - - and this rule, as I've just articulated,
3 is a direct application of Miranda.
4 As the Supreme Court said in Howes v. Fields back
5 in 2012, not all restraints on the freedom of movement
6 amount to custody for Miranda purposes.
7 JUDGE TROUTMAN: But here, he was surrounded by
8 officers at night. He was cuffed. How - - - how is that
9 not custody?
10 MR. WEISS: Well - - -
11 JUDGE TROUTMAN: Considering all the
12 circumstances?
13 MR. WEISS: Considering all the circumstances,
14 Your Honor, well, it's - - - it's - - - it's - - - first of
15 all, it's unclear when the defendant was handcuffed, but
16 even assuming he was handcuffed when the question was
17 asked, the record still provides support for the court's
18 determination. The fact that the questioning was initiated
19 by the police in a nonconfrontational manner, the setting
20 was outside the defendant's mother's home. None of the
21 guns were drawn. Defendant was forthcoming in providing
22 assistance to the officers by granting them permission to
23 reach inside his car and retrieve his wallet.
24 JUDGE RIVERA: What - - - what are - - - let's
25 say we agree that's not custody. What - - - what does that

1 mean with respect to what he can do? Can he walk away?
2 MR. WEISS: No, he couldn't walk away, Your
3 Honor, because he was seized under the Fourth Amendment.
4 But the distinction drawn by Judge Marcus and the Appellate
5 Division below is that despite the seizure for Fourth
6 Amendment purposes, he was not in custody for Fifth
7 Amendment purposes. And the - - - and the court's - - -
8 and the court's determination here is well supported by the
9 factors I just listed. And moreover, the Supreme Court has
10 held that a motorist who's detained during a roadside
11 detention isn't necessarily in custody for Miranda
12 purposes, even though that person - - - even though that
13 person experiences a significant curtailment on their
14 freedom of movements and wouldn't be free to go. Of
15 course, the defendant in Berkemer was not handcuffed as Mr.
16 Cabrera was, but this court has never held - - - this
17 court, nor the Supreme Court has ever held that any one
18 circumstance is dispositive, and there would be no reason
19 to depart from that pres - - - that precedent today.
20 CHIEF JUDGE WILSON: Could I back up - - -
21 JUDGE HALLIGAN: Did I hear you - - -
22 CHIEF JUDGE WILSON: I'm sorry. Go ahead. Go
23 ahead.
24 JUDGE HALLIGAN: Thank you. Did I hear you to
25 say that you concede that there was no probable cause?

1 MR. WEISS: Your Honor, the court never - - - the
2 court never found - - - the court found that there was
3 reasonable suspicion. I do not believe, just trying to
4 recall off the top of my head, whether we argued in our
5 post-hearing submission that there was probable cause for
6 arrest upon encountering the defendant. But - - - but it's
7 always been our position throughout the litigation that
8 only reasonable suspicion existed at the initial detention.
9 CHIEF JUDGE WILSON: I was going to ask the exact
10 same thing that Judge Halligan did. I thought earlier you
11 said they didn't have probable cause when they stopped him;
12 is that right?
13 MR. WEISS: Correct. They did not have probable
14 cause when they stopped him.
15 CHIEF JUDGE WILSON: And so that then I think
16 goes to the question Judge Troutman was asking earlier,
17 which is is there a reason to remit this to allow for a
18 determination of whether there was probable cause. But if
19 your view is there wasn't probable cause, I think that's
20 the end of that. Does that make sense?
21 MR. WEISS: I - - - I - - - I think that does
22 make sense, Your Honor. There are two - - - there are two
23 circumstances where we - - - where we would view remittal
24 as appropriate here. If the court were to find that the
25 timing of the handcuffing - - - if the timing of when the

1 handcuffs were applied is dispositive to whether the
2 defendant is in custody, then under this court's decision
3 in Tirado, it could remit, if it believes that issue is
4 dispositive. Alternatively, if the court concludes that
5 the defendant is in custody, it could remit - - - it could
6 remit for consideration of whether the subsequent search
7 given at the precinct once he was Mirandized and had signed
8 the consent to search form, sufficiently attenuated any
9 purported prior Miranda violation.
10 JUDGE RIVERA: What - - - what would be an
11 example of - - - other than this case, obviously, what
12 would be an example of handcuffing in which the person is
13 not restrained?
14 MR. WEISS: A person - - - there - - - there is
15 no example. Handcuffing - - - handcuffing imposes a
16 significant restraint.
17 JUDGE RIVERA: Always restrained? Okay.
18 MR. WEISS: Always restrained, Your Honor, but -
19 - - and more often than not, it will be a very significant
20 factor in the analysis of whether a suspect is in custody.
21 But it's - - - but the problem with - - - but the problem
22 with the bright-line rule is that it would erode the leeway
23 courts have to make distinction, to engage in nuance
24 analysis, as Judge Marcus did here.
25 JUDGE RIVERA: But why - - - but why do that?

1 Isn't it really - - - isn't counsel correct? It's - - -
2 it's a very clear rule. That's the beauty of the per se
3 rule. The officers know, you handcuff, give them Miranda
4 warnings, or don't ask any questions, or if you're going to
5 ask questions, know that you're not going to be able to
6 rely for prosecution purposes on whatever statements are
7 made.
8 MR. WEISS: Because oftentimes when the police
9 are in the field investigating crime, they have to make
10 split-second decisions that - - - that don't - - - that
11 don't alwa - - - and the manner in which circumstances
12 unfold don't always provide the opportunity for Miranda
13 warnings to be given.
14 JUDGE RIVERA: They have to make a split-second
15 decision on occasion that they're going to arrest, and they
16 know that they've got to give those warnings once they do
17 that. How is this that much different?
18 MR. WEISS: Well, yes, Your Honor. But it was
19 not a foregone conclusion that the police were going to
20 arrest Mr. Cabrera. The information they received - - -
21 JUDGE RIVERA: No, no. I understand that. I'm
22 just saying to the extent you're arguing, it's not a
23 workable rule. This is the way I've - - - I - - - I heard
24 your response to me. It's not a workable rule given the
25 dynamics and the dangers in the field, and I was just

1 saying but that is the rule when it comes to an arrest, and
2 I can't really find such a - - - an easy distinction
3 between the two.
4 MR. WEISS: I - - - I understand, Your Honor.
5 Well, I would just - - -
6 JUDGE RIVERA: What - - - what's your distinction
7 between the two. That - - - that's what I'm asking.
8 MR. WEISS: I'm sorry. The distinction between?
9 JUDGE RIVERA: Yes, the arrest also poses the
10 same kind of situation you're arguing, right? Sort of
11 the - - - the very fast dynamic, they've got to make split-
12 second decisions, and yet the rule applies with respect to
13 an arrest.
14 MR. WEISS: The - - -
15 JUDGE RIVERA: Miranda ruling.
16 MR. WEISS: Yes, and that is true that - - -in
17 that an arrest is not - - - is not required, you know, it's
18 not always required that the defendant be formally under
19 arrest for the Miranda requirement to be triggered. But
20 the inquiry turns on consideration of all the relevant
21 circumstances and whether a defendant's freedom is
22 restrained is only one step. The court - - - courts must
23 also look to whether the questioning subjected the
24 defendant to the - - - the sort of inherently coercive
25 pressures that were at issue in Miranda. And this is

1 directly from the Supreme Court's decision in - - - in
2 Howes from 2012.
3 I would also just direct this court to its prior
4 decision in Chestnut from 1980 - - -
5 JUDGE RIVERA: Let me try this. What would - - -
6 what would make it not a coercive situation? Being
7 handcuffed, give me an example of when it's not a coercive
8 situation.
9 MR. WEISS: Where - - - where being - - -
10 JUDGE RIVERA: Where being handcuffed is not
11 coercive, does not put coercive pressure on the person
12 handcuffed.
13 MR. WEISS: Perhaps it would feel less coercive
14 if the officer applying handcuffs tells the defendant that
15 he's not under arrest, that this - - - that's it's just
16 being done for safety precautions. But - - - but - - - but
17 here, the use of handcuffs was one of many factors that - -
18 - that was considered by the court below, and certainly,
19 reasonable minds can differ about the inferences to be
20 drawn. But because the record - - - there is a basis in
21 the record to support the findings below, we submit that -
22 - - that no - - - that this court cannot engage in any
23 further review of the claim.
24 Unless this court has any other questions about
25 the Miranda issue, I'm happy to address the Second

1 Amendment claim briefly. This court should reject
2 defendant's Second Amendment challenge as both unpreserved
3 and for lack of standing. Although the defendant - - -
4 this - - - this - - - this was - - - this was a case where
5 it was truly unclear whether the defendant would have been
6 able to satisfy any of the valid licensing restrictions
7 that remain valid following Bruen, and so the need to have
8 applied was - - - was all the more - - - more essential so
9 that the parties could've litigated whether there were
10 other disqualifying factors.
11 With - - - with re - - - with regard to the
12 residency restriction - - - the residency requirement, the
13 record strongly - - - the record casts aspersions on
14 defendant's claim that he is a - - - not that he is a
15 nonresident of New York. At the very least it does suggest
16 that he is a Florida resident in view of statements he told
17 CJ after his arrest and probation before sentence that he
18 intended to return home to live with his mother at the
19 address where he was arrested. And in any - - - and in any
20 event, even if defendant were a nonresident, this court has
21 held that there is no domicile requirement for defendant to
22 obtain a license. So - - - so in view - - - in view of
23 those circumstances, defendant still would've been able to
24 apply.
25 And on the merits, I do just want to make one

1 thing clear about the Bruen decision. Defendant's
2 prosecution here, in fact, I think all - - - all defendants
3 who are prosecuted here, those - - - those charges don't -
4 - - aren't predicated on the fact that they may or may not
5 have been able to satisfy proper cause. It owes to the
6 fact that they failed to obtain any license whatsoever,
7 and - - - and that - - - and that's precisely what happened
8 in this case. Defendant did not obtain a license, and he
9 never claimed that he participated in conduct that would
10 have excepted him from prosecution.
11 CHIEF JUDGE WILSON: Thank you, Counsel.
12 MR. WEISS: Thank you, Your Honor.
13 MS. MURDUKHAYEVA: Hello, again. Ester
14 Murdukhayeva for the Attorney General. I have three points
15 I'd like to make on standing and then two points on the
16 merits, if I - - - if I have time to get there.
17 On standing, I think that term is a bit of a
18 misnomer that comes from the way it's been used in the
19 cases. Really, the question of standing is more about what
20 legal issues are germane to the legality of the criminal
21 prosecution. So if I'm prosecuted for unlawful possession
22 of a weapon, I can't raise a constitutional challenge to a
23 town zoning code, because even if I'm right, it doesn't - -
24 - it doesn't matter. It has no bearing on my criminal
25 conviction, or the criminal charge. And the same applies

1 here.
2 What Mr. Cabrera is arguing is that he has
3 constitutional challenges to the proper cause requirement,
4 and this purported residency requirement. But those are
5 only germane if he would otherwise meet the licensing
6 criteria. We do not know because he's never applied for a
7 license. This record actually reflects he might not have
8 been able to meet that criteria for at least two reasons.
9 First, he admitted that he was selling weapons without a
10 valid federal firearms license. Depending on how those
11 transactions occurred, that could be a violation of federal
12 law. And we know that he violated New York State law by
13 bringing an AR-15 into the state, which is a banned assault
14 weapon, as well as at least three large capacity magazines,
15 which are also banned under New York law.
16 So on this record we simply have no way of
17 knowing whether his conviction - - - whether his
18 constitutional challenges actually have any bearing to the
19 legality of his conviction. The other two points I'd like
20 to make about standing are why it matters. The first is
21 that there is a fundamental rule of law concern here that
22 is different from some of the First Amendment cases. The
23 self-help approach in the firearms context of just
24 obtaining a weapon because you disagreed with the licensing
25 scheme, and not applying for a licensing scheme, has deadly

1 consequences in ways that do not manifest in the First
2 Amendment context. And there are no cases in the First
3 Amendment context that discuss the implications of the
4 state's public safety interest on that kind of resolution.
5 CHIEF JUDGE WILSON: That sounds like a good
6 means-end argument.
7 MS. MURDUKHAYEVA: Well, Your Honor, I'm not
8 talking about the merits of the Second Amendment claim.
9 I'm talking about the cases in which a Second Amendment
10 claim can be litigated, and there certainly are cases where
11 a person who believes a state licensing scheme is
12 unconstitutional will challenge that scheme, bring it up to
13 whichever court is going to adjudicate it, which will apply
14 the historical standard. I think what I'm arguing here is
15 this is not the right defendant to raise this argument
16 because we have no way of knowing the way in which the
17 licensing scheme would've applied to him. And it is - - -
18 it would greatly disturb the purposes of licensing for
19 firearms possession to simply allow a person to disregard
20 the firearms licensing scheme, wait until they're
21 criminally prosecuted, and then raise the challenge. There
22 are real meaningful public safety consequences for that
23 approach that just do not manifest in the Supreme Court
24 cases that Mr. Cabrera cites.
25 JUDGE RIVERA: Yes, I - - - I take this argument

1 to be it would be a disincentive to apply for a license.
2 MS. MURDUKHAYEVA: Correct, Your Honor, and a
3 disincentive that can have deadly consequences. People
4 haven't died from leafletting without a permit, which is
5 one of the cases that Mr. Cabrera cites as excusing the
6 need to apply for a license before raising a challenge.
7 JUDGE HALLIGAN: Given - - - given Bruen's
8 exclusion of means-ends, how is that consideration
9 relevant? And also, maybe distinctly, what do you do about
10 the fact that the defendant was, in fact, convicted under a
11 statute he claims is unconstitutional. I'm not sure why
12 that's not sufficient injury, in fact, to confer standing.
13 MS. MURDUKHAYEVA: So I'll take that in a couple
14 of turns. Bruen did not say anything about whether
15 unlicensed carry is constitutionally protected. It in fact
16 went out of its way to say that licensing is
17 constitutionally permissible. Therefore, I don't think
18 it's accurate to characterize what Mr. Cabrera did as
19 constitutionally protected because of Bruen. He may have
20 some arguments about the - - - the way in which Bruen
21 affects the legality of the statute under which he was
22 convicted, but those arguments are all predicated on the
23 constitutionality of a licensing scheme that has never
24 actually been applied to him.
25 JUDGE RIVERA: But why isn't your response to

1 Judge Halligan a merits-based response, as opposed to going
2 to the question of standing?
3 MS. MURDUKHAYEVA: I - - - I think the issues
4 are - - - are related. The standing inquiry is really a
5 way to channel this court’s, and other courts’ judicial
6 review of challenges to licensing schemes, to cases where
7 there is a record to meaningfully adjudicate that
8 challenge. That was my - - - my last point about standing
9 is that the reason - - -
10 JUDGE RIVERA: I thought - - - I thought the
11 argument is, look, Bruen said he's got a particular
12 constitutional right, the licensing scheme affects that
13 right in a way that is unconstitutional as Bruen recognizes
14 it. That's the argument, and therefore, the conviction has
15 fault. It's unconstitutional. People can argue anything
16 in response saying that's not what Bruen held. All of
17 those arguments that are in the briefs, aren't those merits
18 arguments? But the standing is whether or not you can make
19 the argument, yeah?
20 MS. MURDUKHAYEVA: That - - - that's true, Your
21 Honor. And the standing is about what kind of argument you
22 can make. And if what Mr. Cabrera was arguing is that
23 licensing is impermissible altogether, you just can't
24 regulate this conduct through licensing, maybe that's a
25 kind of defense that you could raise in a criminal

1 proceeding. But here, what he's conceded is that there are
2 some licensing criteria that can be constitutionally
3 applied, and had he applied for a license, he would've been
4 able to satisfy that criteria. That's a very different
5 type of constitutional challenge.
6 CHIEF JUDGE WILSON: But then I worry when you
7 tell us to wait for some of the other 900 cases in which
8 the argument was preserved - - - you see where I'm going.
9 I can see by your smile.
10 MS. MURDUKHAYEVA: I do see where you're going,
11 Your Honor.
12 CHIEF JUDGE WILSON: But we can't do anything
13 about those because of your other argument, that the only
14 way we can really get to this is by a facial challenge.
15 MS. MURDUKHAYEVA: I understand that concern,
16 Your Honor. And I - - - I guess my only answer, my best
17 answer, is that preservation and standing are two separate
18 inquiries, and the preservation inquiry - - -
19 CHIEF JUDGE WILSON: Well, I get - - - I get
20 that. But really then we should just disregard the fact
21 that you've got a whole bunch of criminal cases. In some
22 of them the issue's preserved because you're going to come
23 here and tell us that there's no standing, and we really
24 have to wait for another case. So all it means is that we
25 should just - - - as persuasive as it was, it doesn't have

1 any practical effect for us.
2 MS. MURDUKHAYEVA: Well, it does from the
3 perspective of preservation, right, because it - - - there
4 will be preserved challenges.
5 CHIEF JUDGE WILSON: But we still can't get - - -
6 MS. MURDUKHAYEVA: Whether a - - - whether a
7 preserved challenge ultimately succeeds on the merits
8 really is not part of the preservation inquiry, as you
9 know. I think the other point that I will make is there is
10 a lot of civil litigation that is challenging various
11 aspects of New York's licensing scheme. And as those cases
12 start to become decided, they will inform the way in which
13 different criminal cases are decided, the way in which
14 prosecutors are charging cases, and the way in which maybe
15 this court ultimately considers a constitutional challenge
16 in a properly presented case.
17 JUDGE HALLIGAN: To that - - - to that point, if
18 I can. At least some of the defendants are requesting that
19 their cases be remitted so that there can be some
20 development of arguments on the Second Amendment front. So
21 in light of your concern that you voiced about the need to
22 build a record on the historical tradition, why not remit
23 these cases specifically?
24 MS. MURDUKHAYEVA: Well, Your Honor, in all of
25 these cases there would be a need not only to build a

1 record on the historical tradition, but on these particular
2 individuals' qualifications under the licensing scheme
3 otherwise. So that would involve creating a record that's
4 relevant to good moral character, creating a record that is
5 relevant to other disqualifiers. You really would turn
6 that remittal into many administrative proceeding involving
7 counterfactual scenarios about an application that was
8 never filed. That - - - that's just not an efficient use
9 of judicial resources.
10 If I may make just one argument about the merits
11 and the consequences of the merits argument, and this
12 really relates to both the - - - the challenge to the CPW
13 conviction and the privileges and immunities claim. If Mr.
14 Cabrera and other defendants are correct, then every
15 conviction for unlawful weapons possession in New York
16 prior to the CCIA taking effect on September - - - in
17 September 2022 was unconstitutional. And if - - - the same
18 would be the result in the six other jurisdictions that had
19 proper cause requirements prior to Bruen.
20 CHIEF JUDGE WILSON: Well, could there be a
21 difference between cases that have wound their way through
22 direct appeal and are final and cases that are pending on
23 appeal?
24 MS. MURDUKHAYEVA: Possibly, Your Honor. That's
25 typically a difference that comes up in retroactivity

1 considerations. Even that would be a tremendous number.
2 And given the severity of that consequence, both for New
3 York as well as for the six other jurisdictions, which
4 include California, Hawaii, Maryland, Massachusetts, New
5 Jersey, and D.C., you would expect the Supreme Court to
6 have said something about that. If the Supreme Court
7 really believed, or intended, for a consequence of Bruen to
8 be an invalidation of existing gun - - - unlicensed gun
9 possession convictions, that is the type of consequence
10 that you would expect to be addressed, and that is
11 completely discordant with the statements made in Justice
12 Kavanaugh's concurrence or Justice Alito's concurrence
13 about the limited effect of the ruling.
14 CHIEF JUDGE WILSON: So one more thing for you,
15 and I won't hold you to this at all. This is just out of
16 my curiosity. So it's just because you may have thought
17 about this, and I'm not sure what the answer ought to be
18 anyway. What would - - - I assume that there - - - I know,
19 I guess, that there are many cases in which indictment
20 contains several charges, one of which, or more, might be
21 criminal possession of a weapon. The other might be
22 robbery or assault, or something like that, and in some of
23 those the plea is taken just on the CPW and the others by
24 plea are dismissed. What would happen to a plea agreement
25 in that circumstance were we to vacate the CPW on a

1 constitutional ground? Do you get a chance to re-prosecute
2 on the other ones, or are those waived, or who knows what
3 would happen?
4 MS. MURDUKHAYEVA: I have no idea. It really
5 does highlight some of the preservation problems. So for
6 example, if a constitutional challenge to the CPW claim had
7 been raised, the prosecution might have charged
8 differently. It might have offered a different plea
9 agreement. In Mr. Cabrera's case, for example, the
10 prosecution might have charged a Safe Act violation with
11 bringing the AR-15 and the large capacity magazines into
12 the state. It's too burdensome, and honestly, difficult to
13 unwind these counterfactual scenarios, which is one of the
14 many purposes of the preservation requirement.
15 CHIEF JUDGE WILSON: Thank you.
16 MS. MURDUKHAYEVA: Thank you.
17 MS. ZOLOT: Just a minute on Miranda, then I'd
18 like to address some of the AG's arguments. On Miranda,
19 you know, I think my adversary's argument that there should
20 be some kind of broad totality test here, even where
21 there's handcuffing, it just points - - - Mr. Cabrera's
22 case points out the problem with that. I mean, the hearing
23 court found that Mr. Cabrera was not in custody, arguably
24 because, you know, the tone of voice wasn't really
25 commanding, or whatever the other factors are, but there

1 was handcuffing. I mean that in itself - - -
2 JUDGE GARCIA: But let's say - - - let - - - I
3 think we were trying to get at before what would be some
4 circumstances where it might not be, right? So what if
5 there's a stop, the officers think there might be some
6 dangerous thing in - - - in the car, and they say, okay, if
7 you want to stay here, I'm going to handcuff you, you're
8 not under arrest, but for your safety and my safety, I'm
9 going to handcuff you. Or you can go 40 feet over there
10 and stand by that tree, and the guy says, no, I want to see
11 what you're doing here, and they handcuff him. Per se
12 rule?
13 MS. ZOLOT: Well, yes. There's still a per se
14 rule because that's - - - we can imagine scenarios like
15 that, but they are such outliers and so unlikely to occur.
16 JUDGE GARCIA: Well, there's People v. Green out
17 of the Fourth Department, which is, there's an officer with
18 the defendant, puts him in handcuffs because he's providing
19 evasive answers and standing close to several sharp farm
20 implements. And the officer informs him he's just trying
21 to sort out what happened during the accident, and the
22 defendant isn't under arrest. But that's a real scenario,
23 but we wouldn't get into any of those factors, because once
24 he handcuffs him, it's - - - it's a bright-line rule.
25 MS. ZOLOT: Well, two answers to that. First,

1 you know, that itself is really a very unusual fact
2 pattern, and it doesn't make sense to create a rule, a
3 mushy, you know, look at everything rule around what's a
4 really a very unlikely scenario when the per se rule would
5 reach the correct result in the vast majority of cases. I
6 mean, the juice isn't worth the squeeze to have a rule
7 that's taking into account all these. But aside from that,
8 what you just - - - what Your Honor just described, you
9 know, the analysis would be the person - - - if the person
10 was put into custody - - - if the person's put in
11 handcuffs, there's custody. And then the hearing court
12 would say, okay, that person is in custody, were Mirandas
13 administered. And if Mirandas were not administered, then
14 the question would be, is there an exception to giving
15 Miranda warnings, and there are two limited exceptions, one
16 of which might well have applied in Green. There's the
17 public safety exception, which my adversary says was not
18 argued - - - wasn't argued - - -
19 JUDGE GARCIA: Public safety as I understood it
20 was always more, is there a bomb in the trunk, you know,
21 that's the question you can ask without Miranda, right?
22 I - - - I don't see this - - - because you might get access
23 here, I'm handcuffing you - - -
24 MS. ZOLOT: Right.
25 JUDGE GARCIA: - - - is a different public safety

1 argument, right?

2 MS. ZOLOT: Well, the - - - the other exception

3 is sort of more relevant, which is the so-called Huffman

4 exception, which really goes to whether or not it's

5 interrogation or not. And the Huffman exception says that

6 when the police happen upon something volatile, confusing,

7 they're trying to sort it out - - - in Huffman, there was

8 someone behind a bush and it was late at night, and no one

9 knew what was going on, that when there's that sort of

10 volatile, confusing situation, then it's not about custody.

11 The individual may be - - - is in custody. They were in

12 custody in Huffman, but whether there's an exception that

13 excuses the absence of Miranda warnings and, you know, that

14 sort of situation would. So you know, it - - - it - - - it

15 really doesn't need to be - - - the court could find

16 custody, and then still accommodate what might be sort of

17 unusual situations that would still give the police ample

18 leeway to do their investigation.

19 On the Bruen point, a couple of points there. I

20 mean, first of all this idea that because my client may,

21 allegedly, had an AM-15, an assault-type weapon, he was

22 convicted of possessing a single pistol, and he is

23 challenging his conviction for - - - he is challenging that

24 conviction. So these other facts which remain unproven,

25 and he didn't plead guilty to them, are really not relevant

1 to the analysis.
2 In terms of my - - - the attorney general's - - -
3 CHIEF JUDGE WILSON: Could he be reindicted on
4 some of the - - - on some of the other charges?
5 MS. ZOLOT: Well, I believe if his - - - if his
6 plea were vacated, those counts would be revived. And to
7 Your Honor's point also about the other charges that are
8 joined, that has relevance in other ways too. I mean,
9 often times CPW convictions are joined with more serious
10 charges. So this idea that undoing the criminal weapon
11 conviction would, you know, leash - - - unleash all of this
12 on New York State, I mean, these - - - first of all, a
13 number of these clients who pleaded guilty may well choose
14 not to take that risk because it would revive those other
15 charges. But in addition, there are other charges that the
16 individual may well remain convicted of if they were also
17 convicted of those charges after trial.
18 And there is, you know, there is precedent. This
19 Bruen is really, like, not just once in a generation, but
20 probably a once in a lifetime type of case that's
21 reimagining the scope of a constitutional right. And - - -
22 and it would lead to work by the lower courts in figuring
23 out what to do with these possibly unconstitutional
24 convictions. But there's precedent for this court taking
25 that action in the PRS context. This court reached a

1 decision on post-release supervision that led to
2 resentencings in untold countless number of cases. But it
3 was called for by what this court held in the area of post-
4 release supervision, the need for courts to actually
5 pronounce it.
6 Where potentially unconstitutional convictions
7 are at stake, it seems as though the imperatives are even
8 greater to make sure that people aren't serving substantial
9 time in New York for unconstitutional convictions that are
10 traceable to the proper cause requirement, as is the case,
11 or may well be the case in Mr. Cabrera's case. So for
12 those reasons, we ask the court to, at a minimum, remit on
13 the - - - on the Bruen issues.
14 CHIEF JUDGE WILSON: Thank you.
15 (Court is adjourned)
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1 C E R T I F I C A T I O N
2
3 I, Christy Wright, certify that the foregoing
4 transcript of proceedings in the Court of Appeals of Ramon
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