No. _____

In The
Supreme Court of the United States

LAZARUS CASAS,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Department

APPENDIX

Caprice R. Jenerson
Victorien Wu*
**Counsel of Record*
Office of the Appellate Defender
11 Park Place, Suite 1601
New York, New York 10007
(212) 402-4100
vwu@oadnyc.org

Counsel for Petitioner

May 15, 2025

TABLE OF CONTENTS

Appendix A

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Renwick, P.J., Moulton, Friedman, Kapnick, Kennedy, JJ.

3115 THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
Ind. No. 71633/22
Case No. 2022-05191

-against-

LAZARUS CASAS, Defendant-Appellant.

Caprice R. Jenerson, Office of the Appellate Defender, New York (Victorien Wu of counsel), for appellant.

Alvin L. Bragg, Jr., District Attorney, New York (Nathan Morgante of counsel), for respondent.

Judgment, Supreme Court, New York County (Robert M. Mandelbaum, J., at motion; Neil Ross, J., at plea and sentencing), rendered November 7, 2022, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, and sentencing him to a term of 3½ years to be followed by 2½ years of postrelease supervision, unanimously affirmed.

We find that on the present record, defendant has not established that his prosecution and conviction are unconstitutional under *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]), or that he would be entitled to vacatur of his

conviction on that basis (*see People v Daniels*, 224 AD3d 554 [1st Dept 2024], *lv denied* 41 NY3d 982 [2024]; *People v Seigniuos*, 222 AD3d 413 [1st Dept 2023], *lv denied* 40 NY3d 1094 [2024]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: November 26, 2024

Susanna Molina Rojas
Clerk of the Court

Appendix B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM: PART 75

THE PEOPLE OF THE STATE OF NEW YORK	:	
-against-	:	DECISION AND ORDER
LAZARUS CASAS,	:	Ind. No. 71633/2022
Defendant.	:	

ROBERT M. MANDELBAUM, J.:

The evidence before the grand jury was legally sufficient to support each of the charges, as to which the grand jurors were properly instructed, and the proceedings were properly conducted in all respects.

Defendant's motion to dismiss the charges as unconstitutional is denied (see Libertarian Party of Erie County v Cuomo, 970 F3d 106, 127-128 [2d Cir 2020]). Nor is the permissive presumption contained in Penal Law § 265.15 (4) unconstitutional (see People v Galindo, 23 NY3d 719, 725-726 [2014]; Leary v United States, 395 US 6 [1969]).

The first count of the indictment, charging criminal possession of a weapon in the second degree with intent to use unlawfully against another, in violation of Penal Law § 265.03 (1) (b), based on conduct alleged to have occurred on April 13, 2022, is not duplicitous. This crime constitutes a continuing offense "as long as a defendant possesses the weapon intending to use it against a particular person or group of persons. If that intent abates, the crime is completed, even though defendant continues to possess the weapon, and a subsequently formed intent while possessing the weapon results in the commission of a second offense" (People v Okafore, 72 NY2d 81, 83 [1988]; see also Matter of Johnson v Morgenthau, 69 NY2d 148 [1987]). Here, unlike in Okafore, defendant's continuous possession of the firearm spanned a single 15-minute

incident comprising a single intent and therefore a single offense. Defendant is alleged to have entered a building, walked upstairs to his apartment, left the apartment with the firearm and proceeded to the roof, discharged the firearm, returned downstairs to his apartment, and then again left the apartment. Since defendant never formed a new criminal intent to use the firearm against a different set of persons, the count charging his continuous possession reflects a single occurrence and is not duplicitous.

Nor is the indictment unclear as to whether count one charges the continuous 15-minute possession that included the rooftop discharge of a gunshot on April 13, 2022, resulting in defendant's arrest minutes later, or, instead, charges what defendant contends was a separate possession of the firearm inside of a safe in a bedroom in his apartment, from which it was recovered the following day pursuant to a search warrant. First, the indictment plainly does not include any distinct possession potentially engaged in by defendant at the time of the police seizure of the weapon, since the search warrant was executed on April 14, 2022, and the indictment alleges conduct occurring only on April 13. Moreover, the bill of particulars confirms that the allegations pertain to the specific incident comprising the April 13 possession committed at the time of the discharge of the weapon. In any event, the recovery of the firearm on April 14 from a location in which defendant is alleged to have attempted to conceal it following the April 13 incident did not constitute a separate offense, but rather merely the collection of evidence of the April 13 crime.

The motion to controvert the search warrant is denied. The Court has examined the warrant and supporting affidavit and finds that reasonable cause supported its issuance by the magistrate. The warrant, which authorized the search of a particular apartment and sought specifically enumerated categories of relevant information – namely, evidence related to

firearms, ammunition, and firearm accessories; and evidence of the ownership and use of the target apartment – was not overbroad.

Defendant's motions to suppress noticed statements and noticed identification testimony are held in abeyance pending an evidentiary hearing (see People v Huntley, 15 NY2d 72 [1965]; United States v Wade, 388 US 218 [1967]; Dunaway v New York, 442 US 200 [1979]; People v Gethers, 86 NY2d 159 [1995]).

All parties are expected to timely comply with their statutory and constitutional discovery obligations. A list of all misconduct and criminal acts of the defendant not charged in the indictment that the People intend to use at trial, either to impeach defendant's credibility (see People v Sandoval, 34 NY2d 371 [1974]) or as substantive proof of any material issue in the case (see People v Molineux, 168 NY 264 [1901]; People v Ventimiglia, 52 NY2d 350 [1981]), is to be timely disclosed, after which a hearing on its admissibility will be held by the trial court.

This opinion shall constitute the decision and order of the court.

Dated: June 3, 2022
New York, New York

ROBERT M. MANDELBAUM
Acting Justice of the Supreme Court

Appendix C

State of New York
Court of Appeals

BEFORE: HON. MADELINE SINGAS, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent

-against-

ORDER DENYING LEAVE

LAZARUS CASAS,

Appellant.

Appellant having applied for leave to appeal to this Court pursuant to Criminal Procedure Law § 460.20 from an order in the above-captioned case;*

UPON the papers filed and due deliberation, it is

ORDERED that the application is denied.

Dated: February 21, 2025
at Albany, New York

Associate Judge

*Description of Order: Order of the Appellate Division, First Department, entered November 26, 2024, affirming a judgment of Supreme Court, New York County, rendered November 7, 2022.

Appendix D

Constitutional and Statutory Provisions Involved

U.S. Const. amend. II

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

U.S. Const. amend. XIV, § 1

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

U.S. Const. art. VI, cl. 2

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

N.Y. Penal Law § 400.00(1)-(2)

"1. Eligibility. . . . No license shall be issued or renewed except for an applicant (a) twenty-one years of age or older, provided, however, that where such applicant has been honorably discharged from the United States army, navy, marine corps, air force or coast guard, or the national guard of the state of New York, no such age restriction shall apply; (b) of good moral character; (c) who has not been convicted anywhere of a felony or a serious offense or who is not the subject of an outstanding warrant of arrest issued upon the alleged commission of a felony or serious offense; (d) who is not a fugitive from justice; (e) who is not an unlawful user of or addicted to

any controlled substance as defined in section 21 U.S.C. 802; (f) who being an alien (i) is not illegally or unlawfully in the United States or (ii) has not been admitted to the United States under a nonimmigrant visa subject to the exception in 18 U.S.C. 922(y)(2); (g) who has not been discharged from the Armed Forces under dishonorable conditions; (h) who, having been a citizen of the United States, has not renounced his or her citizenship; (i) who has stated whether he or she has ever suffered any mental illness; (j) who has not been involuntarily committed to a facility under the jurisdiction of an office of the department of mental hygiene pursuant to article nine or fifteen of the mental hygiene law, article seven hundred thirty or section 330.20 of the criminal procedure law, section four hundred two or five hundred eight of the correction law, section 322.2 or 353.4 of the family court act, or has not been civilly confined in a secure treatment facility pursuant to article ten of the mental hygiene law; (k) who has not had a license revoked or who is not under a suspension or ineligibility order issued pursuant to the provisions of section 530.14 of the criminal procedure law or section eight hundred forty-two-a of the family court act; (l) in the county of Westchester, who has successfully completed a firearms safety course and test as evidenced by a certificate of completion issued in his or her name and endorsed and affirmed under the penalties of perjury by a duly authorized instructor, except that: (i) persons who are honorably discharged from the United States army, navy, marine corps or coast guard, or of the national guard of the state of New York, and produce evidence of official qualification in firearms during the term of service are not required to have completed those hours of a firearms safety course pertaining to

the safe use, carrying, possession, maintenance and storage of a firearm; and (ii) persons who were licensed to possess a pistol or revolver prior to the effective date of this paragraph are not required to have completed a firearms safety course and test; (m) who has not had a guardian appointed for him or her pursuant to any provision of state law, based on a determination that as a result of marked subnormal intelligence, mental illness, incapacity, condition or disease, he or she lacks the mental capacity to contract or manage his or her own affairs; and (n) concerning whom no good cause exists for the denial of the license. . . .

1-a. For purposes of subdivision one of this section, serious offense shall include an offense in any jurisdiction or the former penal law that includes all of the essential elements of a serious offense as defined by subdivision seventeen of section 265.00 of this chapter. . . .

2. Types of licenses. . . . A license for a pistol or revolver, other than an assault weapon or a disguised gun, shall be issued to (a) have and possess in his dwelling by a householder; (b) have and possess in his place of business by a merchant or storekeeper; (c) have and carry concealed while so employed by a messenger employed by a banking institution or express company; (d) have and carry concealed by a justice of the supreme court in the first or second judicial departments, or by a judge of the New York city civil court or the New York city criminal court; (e) have and carry concealed while so employed by a regular employee of an institution of the state, or of any county, city, town or village, under control of a commissioner of correction of the city or any warden, superintendent or head keeper of any state prison,

penitentiary, workhouse, county jail or other institution for the detention of persons convicted or accused of crime or held as witnesses in criminal cases, provided that application is made therefor by such commissioner, warden, superintendent or head keeper; (f) have and carry concealed, without regard to employment or place of possession, by any person when proper cause exists for the issuance thereof; and (g) have, possess, collect and carry antique pistols which are defined as follows: (i) any single shot, muzzle loading pistol with a matchlock, flintlock, percussion cap, or similar type of ignition system manufactured in or before l898, which is not designed for using rimfire or conventional centerfire fixed ammunition; and (ii) any replica of any pistol described in clause (i) hereof if such replica--(1) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or (2) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade. . . . ."

N.Y. Penal Law § 265.01-b

"A person is guilty of criminal possession of a firearm when he or she: (1) possesses any firearm or; (2) lawfully possesses a firearm prior to the effective date of the chapter of the laws of two thousand thirteen which added this section subject to the registration requirements of subdivision sixteen-a of section 400.00 of this chapter and knowingly fails to register such firearm pursuant to such subdivision.

Criminal possession of a firearm is a class E felony."

N.Y. Penal Law § 265.03

"A person is guilty of criminal possession of a weapon in the second degree when:

(1) with intent to use the same unlawfully against another, such person:

(a) possesses a machine-gun; or

(b) possesses a loaded firearm; or

(c) possesses a disguised gun; or

(2) such person possesses five or more firearms; or

(3) such person possesses any loaded firearm. Such possession shall not, except as provided in subdivision one or seven of section 265.02 of this article, constitute a violation of this subdivision if such possession takes place in such person's home or place of business.

Criminal possession of a weapon in the second degree is a class C felony."

N.Y. Penal Law § 265.20(a)(3)

"a. Paragraph (h) of subdivision twenty-two of section 265.00 and sections . . . 265.01-b . . . 265.03 . . . shall not apply to: . . .

3. Possession of a pistol or revolver by a person to whom a license therefor has been issued as provided under section 400.00 or 400.01 of this chapter . . . ."

Appendix E

SUPREME COURT OF THE COUNTY OF NEW YORK
STATE OF NEW YORK
----------X
THE PEOPLE OF THE STATE OF NEW YORK

NOTICE OF MOTION

-against-

CASA LAZARUS

INDICTMENT No.: 71633-22

Defendant

PLEASE TAKE NOTICE, that upon the annexed affirmation, the undersigned will move this Court at Part 75 on the 6th Day of June 2022, at 9:30 a.m., or as soon Thereafter as counsel may be heard, for the following relief:

1. A Bill of Particulars
2. Discovery in accordance with Article 245.20(1) of the Criminal procedure Law.
3. Dismissal of the indictment for Legal insufficiency, and/or inspection of the grand jury minutes.
4. Dismissal of Count One for being Duplicitous
5. Contravention of the Search Warrant
6. Dismissal of the Indictment because New York's gun possession laws under Penal law 265 are in violation of Deefendant's right to bear arms as guaranteed by the 2nd Amendment to the United States Constitution.
7. Dismissal of Count one because the presumption of unlawful intent 265.15(4) violates Defendant's rights to Due Process and right to bear arms under the New York and Federal Constitutions
8. The Suppression of any Statement Evidence or a Huntley, Dunaway Hearing.
9. The Suppression of any identification evidence or a Wade Dunaway hearing.
10. The reservation of Defendant's right to file such other and further motions, or to amend the instant motion, as may be appropriate; and
11. Such other and further relief as this Court may deem just and appropriate

Dated: NEW YORK, NEW YORK

May 19, 2022

Respectfully Submitted,

By: _____

Robert Briere, Esq. (RB6080)
30 Wall Street Floor 8
New York, New York 10005 212-786-2999

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------X
THE PEOPLE OF THE STATE OF NEW YORK

AFFIRMATION

-against-

LAZARUS CASAS

IND. NO.:71633-22

Defendant
----------X

ROBERT BRIERE, an attorney admitted to practice in the State of New York, who is the attorney of record for the accused, LAZARUS CASAS, hereby affirms under penalties of perjury, pursuant to CPLR 2106, that under information and belief, the facts set forth herein are true:

1. I am the attorney of Record for LAZARUS CASAS, having been appointed by this Court, pursuant to Article 18-B of the County Law.

2. This Affirmation is made in Support of the relief requested in the annexed Notice of Motion. I make this affirmation upon information and belief. The basis of this belief is conversations I have had with the defendant, representatives from the District Attorney's office, review of Discovery served by the District Attorney herein, and the Court's file of this proceeding.

3. The defendant stands before this Court charged by Indictment with one count of Criminal Possession of a Weapon in the Second Degree in violation of Penal Law 265.03(3), one count of Criminal Possession of a Weapon in the Second Degree in violation of Penal Law 265.03(1)(b), and one count of Criminal Possession of a Firearm in violation of Penal Law 265.01-b(1)

4. DEFENDANT IS ENTITLED TO INSPECTION OF THE ENTIRE GRAND JURY MINUTES AND TO DISMISSAL OF THE INDICTMENT IF THAT INSPECTION REVEALS ANY MATERIAL DEFECTS

5. Since grand jury proceedings are secret, see CPL § 190.25(4), it is incumbent upon a trial court to ensure that they were conducted in compliance with the various statutory

32. The duplicity problem with the instant matter is that the evidence in the Grand Jury described two discrete possessory acts. One on the roof of the apartment building, another inside of a safe inside of a bedroom of Apt 3b. It is unclear from the Indictment, whether count one charges the rooftop possession or the apartment 3B possession.

33. **THE INDICTMENT SHOULD BE DISMISSED BECAUSE NEW YORK'S RESTRICTIVE CARRY REGIME VIOLATES DEFENDANT'S RIGHT TO BEAR ARMS AS GUARANTEED BY THE 2ND AND 14th AMENDMENT'S TO THE UNITED STATES CONSTITUTION.**

34. To carry a firearm outside the home, New York provides members of the general public with a single option: obtain a license to "have and carry" a "pistol or revolver ... concealed." Id. §400.00(2)(f). In addition to satisfying the conditions to possess a firearm in the home, an applicant for a license to carry a firearm outside the home must demonstrate, to a licensing officer's satisfaction, that "proper cause exists for the issuance thereof." Id. §400.00(2)(f). These onerous requirements violate the Second Amendment's right to bear arms. Accordingly, the Indictment should be dismissed.

35. **THE INDICTMENT SHOULD BE DISMISSED BECAUSE NEW YORKS GUN POSSESSION LAWS VIOLATE THE 2nd AMENDMENT TO THE UNITED STATES CONSTITUTION AS THEY REQUIRE PERSONS TO OBTAIN A PERMIT TO HAVE A FIREARM EVEN INSIDE OF THEIR HOME FOR SELF DEFENSE AND NEW YORK CITY'S GUN LICENSING SCHEME IS SO RESTRICTIVE, DISCRIMINATORY, ARBITRARY AND UNFAIR THAT IT PRACTICALLY AMOUNTS TO A TOTAL BAN ON POSSESSING FIREARMS**

INSIDE OF THE HOME.

36. The Second Amendment affords the people "the right to keep and bear arms." U.S. Const. amends. II, XIV; *McDonald v. City of Chicago,* 561 U.S. 742 (2010); *District of Columbia v. Heller,* 554 U.S. 570 (2008). Despite the clear text and the Supreme Court's precedent, New York effectively deprives its people of the Second Amendment right by requiring that they successfully obtain a license from the police before exercising it. The availability of a license in New York City for both 'in the home and/or business' or to carry outside the home are too onerous, unfair, costly and discriminatory to comport with the Second Amendment's right of individuals to keep a loaded pistol in the home for protection or to carry outside of the home for protection.

37. Penal Law 265.01 thru 265.03 is unconstitutional because it imposes criminal sanctions against those such as Defendant who are alleged to have exercised their Constitutional right to bear arms without first obtaining a permit through NEW York's onerous and discriminatory licensing permit scheme.

THE PRESUMPTION OF INTENT TO USE UNLAWFULLY UNDER PENAL LAW § 265.15(4) IS UNCONSTITUTIONALLY IRRATIONAL AND ARBITRARY NOW THAT MCDONALD V. CHICAGO AND HELLER HAVE DESIGNATED HANDGUNS AS THE QUINTESSENTIAL HOME DEFENSE WEAPON.

38. Defendant is charged under CPL 265.03(1)(b) under a theory that the Defendant possessed a loaded firearm with the intent to use it unlawfully against another. Upon information and belief, this charge is based on the presumption of P.L. § 265.14(4) which

70. **WHEREFORE**, defendant, by his undersigned attorney, respectfully requests that this court grant him the relief requested in the annexed notice of Motion together with such other relief as this Court deems just and appropriate.

DATED: NEW YORK, NEW YORK

April 19, 2022

Respectfully Submitted,

By: _____

Robert Briere, Esq. (RB6080)
30 Wall Street Fl 8
New York, New York 10005
(212) 786-2999

Attorney for LAZARUS CASAS

To: Cyrus Vance
New York County District Attorney.
Attention: ADA JOHN FULLER

Clerk of Supreme Court
New York, County Part 75

Attorney General

Appendix F

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 75

THE PEOPLE OF THE STATE OF NEW YORK -against- LAZARUS CASAS, Defendant.	AFFIRMATION IN RESPONSE TO THE DEFENDANT'S OMNIBUS MOTION Ind. No. IND-71633-22

John Fuller, an attorney admitted to practice before the Courts of this State, affirms under penalty of perjury that:

1. I am the Assistant District Attorney in New York County assigned to this case and am familiar with its facts.

2. This affirmation is submitted in response to the defendant's omnibus motion in which the defendant seeks inspection of the grand jury minutes and the dismissal of the indictment, a bill of particulars, pretrial discovery, suppression of statements, suppression of identification testimony, some following action, and in support of the People's request for reciprocal discovery.

PEOPLE'S RESPONSE TO THE DEFENDANT'S MOTION TO INSPECT THE GRAND JURY MINUTES AND TO DISMISS THE INDICTMENT

3. The People consent to the Court's in camera review of the grand jury minutes. A copy of the grand jury minutes were provided to the court on May 4, 2022 for in camera review. Inspection will reveal that the evidence before the grand jury amply supports the

defendant takes out a firearm from a bag, displays it unlawfully, and then returns the firearm to the bag where it is recovered by police shortly thereafter. In such circumstances, the defendant committed a single offense, though he did first retrieve the firearm at the beginning of the offense, and then conceal the firearm at the end. Similarly, here, the defendant first retrieved the firearm from his apartment, then left his apartment to use the firearm unlawfully, and then returned the firearm to his apartment to conceal it. The only difference between the two circumstances is that the defendant here had to physically change locations to retrieve and deposit the firearm, and the police first took time to obtain a search warrant to recover the firearm from the apartment.

9. Conversely, if the defendant's interpretation of *Okafore* were applied to the instant case, there could be an almost infinite number of counts applied to defendant's possession of the firearm thereby rendering the charges multiplicitous. For instance, the defendant could be charged with separate crimes for possessing the firearm in the hallway, concealing the gun under his shirt in the stairwell, visibly displaying the gun in the stairwell, on the roof, and so on and so forth. Instead, distinctly different intents must be shown for multiple counts to be proper. The logical conclusion in this case is that the defendant committed a single offense because the defendant had a single intent throughout the period of possession for which he is presently charged. As such, the defendant's motion to dismiss count one for duplicity should be denied.

10. Finally, the indictment does not violate the defendant's Second Amendment rights under the United States Constitution, nor does the presumption of unlawful intent violate the defendant's due process rights under either the New York State or United States

Constitutions. The defendant challenges the constitutionality of PL § 265.03, Criminal Possession of a Weapon in the Second Degree, on the grounds that the State of New York's firearms licensing scheme deprives the defendant of his right to bear arms under the U.S. Constitution, Amendment II. The United States Court of Appeals for the Second Circuit has already considered this issue and upheld the constitutionality of PL § 265.03 on this ground, as the licensing regime is not onerous and is substantially related to a compelling government interest. *See Libertarian Party of Erie County v. Cuomo*, 970 F.3d 106, 127-28 (2nd Cir. 2020)(*noting that* "New York's at-home license regime, while affecting the core Second Amendment right, imposes nowhere near the burden that was at issue in *Heller*"). Similarly, the Court of Appeals has rejected the notion that PL § 265.15(4) would be unconstitutional if challenged. *See People v. Galindo*, 23 N.Y.3d 719, 725-26 (*noting that* "nor can the dissent credibly claim that the presumption of unlawful intent was unconstitutional as applied to defendant here[...]"); *see also County Couty of Ulster County v. Allen*, 442 U.S. 140, 167 (1979) (*holding that* "the permissive presumption, as used in this case, satisfied the *Leary* test").

PEOPLE'S RESPONSE TO THE DEFENDANT'S REQUEST FOR A BILL OF PARTICULARS

11. The facts set forth in the indictment, felony complaint, the discovery provided pursuant to CPL Article 245, and the Automatic Discovery Form ("ADF"), which was previously served upon defendant, provide all the particulars to which the defendant is entitled. *See* CPL §200.95. They specify "the substance of defendant's conduct ... which the People intend to prove at trial on their direct case ...." The other information requested is evidentiary detail beyond the scope of a bill of particulars. *See, People v Davis*, 41 NY2d 678,

are evidence of defendant's commission of the charged offense and demonstrate his use and ownership over the firearm at issue in the case.

22. As inspection of the search warrant and affidavit will reveal, the warrant was amply supported by probable cause and was sufficiently particularized. The defendant's contentions are without merit and his motion to controvert the search warrant should be denied.

Wherefore, it is respectfully requested that, except as consented to herein, the defendant's motion should be denied.

Dated: New York, New York
June 1, 2022

Respectfully submitted,

Alvin L. Bragg, Jr.
District Attorney
New York County

By: _____
John Fuller
Assistant District Attorney
Of Counsel
(212) 335-3855

Appendix G

FILED: APPELLATE DIVISION - 1ST DEPT 06/17/2024 10:16 AM 2022-05191
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 06/17/2024

To be argued by
Victorien Wu
15 minutes requested

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION: FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

LAZARUS CASAS,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT LAZARUS CASAS

Ind. No. 71633/22 (New York County)
App. Case No. 2022-05191

CAPRICE R. JENERSON, ESQ.
Attorney for Defendant-Appellant

By: VICTORIEN WU, ESQ.
Supervising Attorney

DANIEL KENNY
Law Intern

OFFICE OF THE APPELLATE DEFENDER
11 Park Place, 16th Floor
New York, NY 10007
(212) 402-4100
vwu@oadnyc.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Session Laws

Regulations

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

- against -

LAZARUS CASAS,
Defendant-Appellant.

Ind. No.
71633/22

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction rendered on November 7, 2022, by Supreme Court, New York County. Lazarus Casas was convicted, following a guilty plea, of one count of criminal possession of a weapon in the second degree. Penal Law § 265.03(1)(b). Mr. Casas was sentenced to three and a half years of prison and two and a half years of post-release supervision. Justice Robert Mandelbaum presided at omnibus motion, and Justice Neil Ross presided at plea and sentencing.

Timely notice of appeal was filed, and Mr. Casas was granted leave to prosecute this appeal as a poor person on the original record and a reproduced appellant's brief. No stay of execution has been sought. Mr. Casas is currently serving the sentence. There were no

codefendants below.

QUESTION PRESENTED

Does the Second Amendment require the dismissal of an indictment charging violations of Penal Law §§ 265.03 and 265.01-b, which only punish unlicensed firearm possession, because New York's then-existing firearm licensing scheme was unconstitutionally burdensome?

INTRODUCTION

Lazarus Casas was charged with criminal possession of a weapon after he discharged a firearm into the air while on the rooftop of his apartment building on April 13, 2022. The New York Penal Law provisions that Mr. Casas was charged with violating only punish the unlicensed possession of a firearm. But the licensing scheme in effect at the time was unconstitutionally burdensome in violation of the Second and Fourteenth Amendments to the U.S. Constitution. It required applicants to demonstrate "proper cause"—defined as a "special need for self-protection"—to obtain a license to "have and carry" a "pistol or revolver" outside their home. Moreover, it required applicants to show that "no good cause exists for the denial" of a license even for possession of a firearm in the home. Under these provisions, state licensing officials had wide discretion to deny the firearm licenses New Yorkers needed to exercise their fundamental Second Amendment rights.

Accordingly, Mr. Casas sought to dismiss the indictment on Second Amendment grounds. Although his motion was denied, the U.S. Supreme Court thereafter confirmed in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), that New York's then-

existing firearm licensing scheme gave licensing officials an unconstitutional level of discretion. Following the U.S. Supreme Court's decision, the Legislature, other state legislatures, and a federal district court have acted to repeal or otherwise invalidate provisions that grant impermissible discretion to licensing officials.

To give full force and effect to the Second Amendment rights that the Court protected in *Bruen*, the charges against Mr. Casas must be dismissed. Time and again, the U.S. Supreme Court has held that Second Amendment rights are not second-class rights. Like other Bill of Rights guarantees, these fundamental freedoms cannot hinge on a licensing scheme that invests state officials with overbroad discretion. It follows that the state cannot prosecute individuals like Mr. Casas for not obtaining a license under such an unconstitutionally discretionary scheme. When the state can so punish individuals for failing to meet requirements that do not withstand constitutional scrutiny, it cheapens the guarantees of the Bill of Rights to the point of meaninglessness. Consequently, the judgment must be reversed, and the indictment dismissed.

STATEMENT OF FACTS

A. The Charges.

Mr. Casas was charged with possession of a firearm on April 13, 2022. Felony Compl.; Indictment No. 71633/22. According to the felony complaint, on that date, Mr. Casas discharged a firearm into the air while he was on the rooftop of his apartment building at 201 W. 83rd Street in Manhattan. Felony Compl.

Mr. Casas was indicted on charges of criminal possession of a weapon in the second degree in violation of Penal Law § 265.03(1)(b), criminal possession of a weapon in the second degree in violation of Penal Law § 265.03(3), and criminal possession of a firearm in violation of Penal Law § 265.01-b(1). Indictment No. 71633/22.

B. Mr. Casas Moves to Dismiss the Charges Based on the Second Amendment.

As part of the omnibus motion, Mr. Casas moved to dismiss the indictment on Second Amendment grounds. Omnibus Motion at 9-10. He asserted, in particular, that because the requirements of New York's gun licensing scheme unconstitutionally burden his Second Amendment rights, the Penal Law provisions that hinge on that licensing scheme—and under which he was indicted—are unconstitutional. *Id.*

Mr. Casas argued that the requirement that an individual applying for a license to carry a firearm outside the home must show that "proper cause exists for the issuance" of a license violates the Second Amendment. *Id.* at 9 (quoting Penal Law § 400.00(2)(f) (2022)). Mr. Casas specifically noted that this proper-cause requirement was "onerous" and therefore violates his Second Amendment rights. *Id.* And Mr. Casas further argued that the licensing scheme—including the additional requirements of Penal Law § 400.00(1)—is "too onerous . . . to comport with the Second Amendment's right of individuals to keep a loaded pistol in the home for protection or to carry outside of the home for protection." *Id.* at 9-10. Accordingly, Mr. Casas asserted that Penal Law §§ 265.01-b(1) and 265.03 are "unconstitutional because [they] impose[] criminal sanctions against those . . . who are alleged to have exercised their Constitutional right to bear arms without first obtaining a permit through [New York]'s onerous . . . licensing permit scheme." *Id.*

In response, the prosecution argued that the licensing scheme is not onerous, and therefore the challenged provisions are not unconstitutional. Omnibus Response at 5-6. In support of this claim, the prosecution cited a case from the U.S. Court of Appeals for the Second

Circuit that upheld New York's licensing scheme and Penal Law proscriptions as constitutional under the Second Amendment. *Id.* at 6 (citing *Libertarian Party of Erie Cnty. v. Cuomo*, 970 F.3d 106, 127-28 (2d Cir. 2020)).

On June 3, 2022, citing the same Second Circuit decision, the lower court denied Mr. Casas's motion to dismiss the charges as unconstitutional under the Second Amendment. Omnibus Decision at 1 (citing *Libertarian Party*, 970 F.3d at 127-28).

C. The Plea and Sentencing.

On September 21, 2022, Mr. Casas pleaded guilty to one count of criminal possession of a weapon in the second degree in violation of Penal Law § 265.03(1)(b) on the promise that he would be sentenced to three and a half years of prison and two and a half years of post-release supervision. P. 7, 10-11.[1]

Prior to sentencing, the Probation Department prepared a presentence investigation report ("PSI"). The PSI indicated that Mr. Casas was born in New York City in 1989. PSI at 4. He was the youngest of four children and was raised primarily by his mother. *Id.*

[1] Citations beginning with "P." and "S." refer to the minutes of the plea and sentencing proceedings, respectively.

Mr. Casas described his childhood as difficult, including instances of parental abuse. *Id.* As a child, he was prescribed medications and underwent treatment for mental health issues, and he was suspended several times for behavioral issues. *Id.* His highest level of education is the ninth-grade level. *Id.* Mr. Casas was diagnosed with bipolar disorder as a teenager, but he was not undergoing treatment for this condition at the time of the PSI. *Id.* at 5.

At the time that this case arose, Mr. Casas lived with his girlfriend and their three children at 201 W. 83rd Street. *Id.* at 4. He was working as an Uber Eats delivery person and received both SSI benefits and food stamps. *Id.* From 2017 to 2019, he worked as a school security guard, but he stopped after his daughter was born. *Id.*

Mr. Casas told the probation officer that, on April 13, 2022, he, his girlfriend, and their children were returning home when he saw a man with whom he had a previous altercation—as well as two other men—standing in front of his apartment building. *Id.* at 3. Believing this to be a threat to his and his family's safety, Mr. Casas went to the rooftop of the building and fired a shot into the air so that these men would leave. *Id.* Mr. Casas said that he was under the influence of alcohol at the

time, and that daily alcohol use had contributed to some of his difficulties. *Id.* at 5. In addition, he said he was a daily user of marijuana. *Id.*

Mr. Casas has no prior felony convictions. *Id.* at 3. He had a misdemeanor conviction for criminal possession of a weapon in the fourth degree and a violation for harassment in the second degree. *Id.* Additionally, Mr. Casas has had orders of protection entered against him. *Id.*

At sentencing on November 7, 2022, Mr. Casas was sentenced to three and a half years of prison and two and a half years of post-release supervision. S. 3.

ARGUMENT

POINT

THE SECOND AMENDMENT REQUIRES DISMISSAL OF THE INDICTMENT, WHICH IMPERMISSIBLY PENALIZES THE FAILURE TO OBTAIN A LICENSE UNDER NEW YORK'S UNCONSTITUTIONAL FIREARM LICENSING SCHEME.

Mr. Casas was effectively prosecuted for failing to obtain a firearm license under the licensing regime in effect in April 2022. In *Bruen*, the U.S. Supreme Court confirmed that New York's then-existing firearm licensing scheme was unconstitutionally burdensome in violation of the Second Amendment. *See* 597 U.S. at 11. Because the licensing regime regulating firearm possession was unconstitutional, Mr. Casas's prosecution under Penal Law §§ 265.01-b and 265.03 was also unconstitutional. Therefore, the charges against Mr. Casas must be dismissed. U.S. Const. amends. II, XIV.

A. Mr. Casas Was Effectively Prosecuted for Failing to Obtain a Firearm License.

Mr. Casas was charged with criminal possession of a weapon in the second degree in violation of Penal Law § 265.03(1)(b), criminal possession of a weapon in the second degree in violation of Penal Law § 265.03(3), and criminal possession of a firearm in violation of Penal Law

§ 265.01-b(1). Indictment No. 71633/22. Crucially, these laws prohibit "only *unlicensed* possession of handguns." *People v. Hughes*, 22 N.Y.3d 44, 50 (2013). A license is a complete defense to a charge of criminal possession of a gun—including, specifically, the charges in the indictment here. *See* Penal Law § 265.20(a)(3) ("[S]ections . . . 265.01-b [and] . . . 265.03 . . . shall not apply to . . . [p]ossession of a pistol or revolver by a person to whom a license therefor has been issued as provided under section 400.00 . . . of this chapter . . . . "). Because Mr. Casas was charged with unlicensed possession of a gun, he was effectively prosecuted for failing to obtain a license.

As New York courts have long recognized, the license is the lynchpin of New York's criminal gun possession laws. Time and again, the Court of Appeals and lower courts have given effect to the complete immunity conferred by a license. The Court of Appeals did so forcefully in *People v. Parker*, 52 N.Y.2d 935, 936 (1981) (adopting the dissenting opinion of Justice Birns in *People v. Parker*, 70 A.D.2d 387, 391-94 (1st Dep't 1979) (Birns, J., dissenting)). In *Parker*, Lincoln Parker had a valid license issued under Penal Law § 400.00. *Parker*, 70 A.D.2d at 391 (Birns, J., dissenting). The license entitled him to possess a pistol in his

home. *Id.* Yet, after allegedly pointing a pistol at his girlfriend on a public street, he was charged with criminal possession of a weapon in the second degree—specifically, possession of a firearm with intent to use unlawfully—in violation of Penal Law § 265.03. *Id.* In his dissent (adopted wholesale by the Court of Appeals), Justice Birns concluded that Mr. Parker's valid license immunized him from that charge. *Id.* at 392. Justice Birns noted that the immunity conferred by Penal Law § 265.20 applies to all conduct charged under Penal Law § 265.03, including conduct that occurs outside the geographical area permitted by the license (*i.e.*, on a public street). *Id.* at 392-93. Justice Birns reasoned that, simply put, the statute requires full immunity from prosecution. *Id.* at 394 ("The majority appears troubled by policy considerations inherent in providing an exemption from prosecution to a person charged with a violation of section 265.03 of the Penal Law, even when that person possesses an unlimited license. Good policy or bad policy—that is what the statute says.").

Likewise, in the companion case of *People v. Serrano*, 52 N.Y.2d 936 (1981), the Court of Appeals affirmed the dismissal of a charge of criminal possession of a weapon "for the reasons stated in the

dissenting opinion of [Justice Birns in *Parker*]." *Id.* at 937. Below, the Appellate Division in *Serrano* had agreed that dismissal was proper, reasoning that, unlike *Parker*, the case involved "naked possession. All that is asserted is that the weapon for which, concededly, defendant held a license . . . was possessed in a place other than that specified in the license." *People v. Serrano*, 71 A.D.2d 258, 261 (1st Dep't 1979). Although the Appellate Division tried to distinguish *Parker* in this way, the Court of Appeals mooted any distinction between the two when it adopted Justice Birns's *Parker* dissent. *See Serrano*, 52 N.Y.2d at 937. Thus, the Court of Appeals in *Parker* and *Serrano* established that courts must give effect to the immunity conferred by a firearm license, regardless of the nature of the possession charge and the geographical scope of the license.

Lower courts have followed suit and given effect to the license-conferred immunity by dismissing charges despite procedural hurdles. For example, the Third Department exercised its interest-of-justice jurisdiction to give effect to that immunity in *People v. Davis*, 193 A.D.2d 954 (3d Dep't 1993). In *Davis*, it was undisputed that Edward Davis had a valid license to possess a pistol. *Id.* at 955-56. However, Mr.

Davis did not seek dismissal of a charge under Penal Law § 265.03 in the trial court, and he did not raise the issue in his appellate brief. *Id.* at 956. Noting that this would ordinarily result in waiver of the issue, the Third Department nevertheless held that "in the interest of justice defendant's conviction for [violating] Penal Law § 265.03 should be reversed and that charge should be dismissed." *Id.*

In sum, the provisions of the Penal Law that Mr. Casas was charged with violating only punish the unlicensed possession of a firearm. New York courts have made clear that a valid license confers complete immunity from charges like the ones at issue here. Therefore, in effect, Mr. Casas was prosecuted for failing to obtain a firearm license.

B. The U.S. Supreme Court Invalidated New York's Firearm Licensing Scheme in *Bruen*.

New York's then-existing licensing scheme unconstitutionally restricted the availability of the immunity conferred by a firearm license. On June 23, 2022, the U.S. Supreme Court confirmed this when it held that the proper-cause requirement of New York's gun licensing scheme violated the Second Amendment. *Bruen*, 597 U.S. at 38-39, 70-71. At issue was the provision requiring that, to obtain a license to

"have and carry" a "pistol or revolver" outside their home, applicants must show that "proper cause exist[ed]." Penal Law § 400.00(2)(f) (2022). "[P]roper cause" did not exist unless the applicant showed "a special need for self-protection distinguishable from that of the general community." *Matter of Klenosky v. N.Y.C. Police Dep't*, 75 A.D.2d 793, 793 (1st Dep't 1980).

In *Bruen*, the Court began by setting forth the proper standard for analyzing whether regulations violate the Second Amendment: "[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24. To determine whether a regulation is consistent with the historical tradition of firearm regulation, a court must "reason[] by analogy," which in turn requires it to decide whether the purportedly analogous historical regulation is "relevantly similar" to the modern regulation at issue. *Id.* at 28-29 (citation and quotation marks omitted). The Court pointed to "at least two metrics" that would render regulations relevantly similar—namely, "how and why the regulations

burden" the right to possess a firearm. *Id.* at 29. Whether the regulations impose "comparable burden[s]" on the right, and whether those "burden[s]" are "comparably justified," are "central" considerations for this inquiry. *Id.* (citations, quotation marks, and emphasis omitted).

The Court then applied this framework to New York's proper-cause requirement. First, it found that the plain text of the Second Amendment (the word "bear") covers the individual conduct at issue (the public carrying of firearms). *Id.* at 32. Then, it concluded that there was no "historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense," and therefore, New York had "failed to meet [its] burden to . . . justify[] [its] proper-cause requirement." *Id.* at 38-39; *see also, e.g.*, *id.* at 50 (finding that none of the historical regulations cited by New York "imposed a substantial burden on public carry analogous to the burden created by New York's restrictive licensing regime").

Importantly, the Court drew a key distinction between "shall-issue" and "may-issue" licensing schemes and observed that New York's may-issue scheme afforded an unconstitutional level of discretion to

licensing officials. *Id.* at 11, 13-15. In "shall[-]issue" jurisdictions, "authorities *must* issue concealed-carry licenses whenever applicants satisfy certain threshold requirements," and authorities do not have "discretion to deny licenses based on a perceived lack of need or suitability." *Id.* at 13 (emphasis added). By contrast, in "may[-]issue" jurisdictions—including New York and only five other states plus the District of Columbia—licensing authorities had such discretion. *Id.* at 13-15. The Court noted that the may-issue schemes in these jurisdictions contained "analogues to [New York's] 'proper cause' standard." *Id.* at 15. The analogous language in these provisions included terms like "good cause," "proper reason," "special need," "good reason," and "justifiable need." *Id.* at 15 n.2 (quoting various state firearm licensing provisions). It was this level of discretion that the Court analyzed and found wanting under its historical-analogue test. *See id.* at 38-39. Indeed, in his concurrence, Justice Kavanaugh (joined by Chief Justice Roberts) noted that the Court's decision "addresses only the unusual discretionary licensing regimes, known as 'may-issue' regimes," used by New York and the six other jurisdictions. *Id.* at 79 (Kavanaugh, J., concurring). By contrast, shall-issue schemes, which

"employ objective licensing requirements," "do not grant open-ended discretion to licensing officials" and therefore are not as a rule unconstitutional (as are may-issue regimes). *Id.* at 80.

After *Bruen*, the Legislature amended Penal Law § 400.00 to comply with the Supreme Court's ruling. *See* L. 2022, ch. 371, § 1. Among other things, the Legislature eliminated the "proper cause" requirement for public carry. *Id.*

C. The Enforcement of New York's Firearm Possession Proscriptions Burdens Mr. Casas's Second Amendment Rights.

When Mr. Casas was charged with violating Penal Law §§ 265.01-b and 265.03, the firearm licensing regime underlying these criminal proscriptions afforded an unconstitutional level of discretion to state licensing authorities. As such, the enforcement of provisions contingent on an unconstitutionally burdensome licensing regime itself impermissibly burdened Mr. Casas's fundamental Second Amendment rights.

The proper-cause requirement was not the only provision of the licensing scheme (such as it was when Mr. Casas was prosecuted) that invested in licensing officials an unconstitutional level of discretion. At

the time, there was another provision requiring an applicant seeking a license to possess a firearm to show that "no good cause exists for the denial of the license." Penal Law § 400.00(1)(n) (2022). Although *Bruen* did not expressly invalidate this no-good-cause provision, the Court recited that provision and implicitly recognized that it was comparable to the proper-cause requirement. *Bruen*, 597 U.S. at 12 (citing Penal Law § 400.00(1)(n) (2022)). Indeed, the Court described a similar provision of California's may-issue licensing scheme as analogous to New York's proper-cause requirement. *See id.* at 15 & n.2 (citing Cal. Penal Code Ann. § 26150 (West 2021) (containing a "[g]ood cause" standard)); *see also* 2023 Cal. Legis. Serv. ch. 249 (reflecting post-*Bruen* repeal of the state's good cause standard). Like California's legislature, the New York Legislature repealed the no-good-cause provision—along with the proper-cause requirement—when it amended the statute post-*Bruen*. *See* L. 2022, ch. 371, § 1.

The no-good-cause requirement in effect at the time Mr. Casas was charged is unconstitutional under the Second Amendment because, like the proper-cause requirement, it afforded licensing officials an unconstitutional level of discretion. Indeed, after *Bruen*, a federal

district court in New York invalidated parallel provisions of New York City law on Second Amendment grounds. *See Srour v. New York City*, ___ F. Supp. 3d ___, 2023 WL 7005172, at *1 (S.D.N.Y. Oct. 24, 2023). In *Srour*, the court heard a challenge to provisions of New York City law allowing licensing officials to deny applications for failure to show that no "good cause" exists for denial of the license. *Id.* at *1, 13 (citing N.Y.C. Admin. Code § 10-303(a)(9) (stating that no person shall be denied a permit "unless good cause exists for the denial of the permit"); Rules of City of New York tit. 38 §§ 3-03, 5-10 (2019) (allowing for denial of rifle/shotgun permits and handgun licenses, respectively, "where it is determined [by the licensing body] that . . . good cause exists for denial")).

Applying the test set forth in *Bruen*, the *Srour* court first determined that the Second Amendment's plain text covered the conduct at issue—firearm possession—thus giving rise to a presumption that the Constitution protects it. *Id.* at *13. The court then noted that the challenged provisions afforded "broad discretion . . . to City officials in determining whether someone may exercise their Second Amendment right." *Id.* at *15. It found that New York City officials had

not demonstrated the required historical analogue for such discretion. *Id.* Accordingly, the court concluded that the provisions could not be sustained and held them "facially unconstitutional." *Id.* at *1.

As the *Srour* court's analysis shows, the no-good-cause requirement of Penal Law § 400.00(1)(n) in effect at the time Mr. Casas was charged imposed another unconstitutional burden on his Second Amendment rights. It afforded licensing officials an impermissible level of discretion, just as the *Srour* court concluded. That is likely why the Legislature repealed it after the U.S. Supreme Court issued its decision in *Bruen*, even though the Court did not specifically invalidate the no-good-cause provision. *See* L. 2022, ch. 371, § 1. This unconstitutionally burdensome discretion—baked, as it was, into New York State's firearm licensing scheme—is precisely why it is unconstitutional to prosecute Mr. Casas for failing to obtain a firearm license.

Moreover, when a licensing regime burdens an individual's Second Amendment rights, it is unconstitutional to prosecute the failure to obtain a license under that scheme. Indeed, the U.S. Supreme Court has held that where a licensing scheme burdens an individual's First Amendment rights, it is unconstitutional to prosecute them for violating

it. *See Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 148, 159 (1969); *Staub v. City of Baxley,* 355 U.S. 313, 314, 325 (1958).

This logic applies with equal force to fundamental Second Amendment rights, which the Supreme Court has said are "not . . . second-class right[s], subject to an entirely different body of rules than the other Bill of Rights guarantees." *Bruen*, 597 U.S. at 70 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion)); *see also id.* at 24 ("This [history-based] Second Amendment standard accords with how we protect other constitutional rights. Take, for instance, the freedom of speech in the First Amendment, to which *Heller* repeatedly compared the right to keep and bear arms."); *District of Columbia v. Heller*, 554 U.S. 570, 582, 591, 595, 606, 618, 625-26, 634-35 (2008) (drawing parallels between Second Amendment and First Amendment rights).

By granting licensing authorities overbroad discretion, laws like New York's pre-*Bruen* firearm licensing regime unconstitutionally burden a fundamental right. In *Shuttlesworth*, the U.S. Supreme Court reversed a conviction for violating a city ordinance that made it an offense to participate in a parade or public demonstration without first

acquiring a permit. 394 U.S. at 148, 159. The Court concluded that the ordinance "conferred upon the City Commission virtually unbridled and absolute power to prohibit any [public demonstration] . . . This ordinance as it was written . . . without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Id.* at 150-51.

For this proposition, the Court cited *Staub*. *Id.* at 151 (citing *Staub*, 355 U.S. at 322). In *Staub*, the Court overturned a conviction for violating a city ordinance requiring a permit to solicit membership in a union because the ordinance unconstitutionally burdened First Amendment freedoms. 355 U.S. at 314 n.1, 325. The ordinance authorized city officials "to refuse to grant the permit if they do not approve of the applicant" according to criteria "without semblance of definitive standards or other controlling guides." *Id* at 322. The Court held that the ordinance unconstitutionally made First Amendment rights "contingent upon the uncontrolled will of an official." *Id.*

In both *Shuttlesworth* and *Staub*, the U.S. Supreme Court overturned convictions based on licensing regimes that burdened fundamental constitutional rights. Likewise, by dint of the proper-cause

and no-good-cause requirements, New York's gun licensing scheme afforded authorities impermissible discretion to deny firearm license applications, which were necessary for New Yorkers to exercise their fundamental Second Amendment rights. The Supreme Court said so in *Bruen*. *See* 597 U.S. at 38-39, 70-71. A federal district court reached a similar conclusion with respect to New York City regulations containing nearly identical language. *See Srour*, 2023 WL 7005172, at *1. And the Legislature itself recognized the same constitutional deficiencies when it repealed both the proper-cause and no-good-cause provisions. *See* L. 2022, ch. 371, § 1.

In sum, to prosecute an individual for failing to meet the requirements of an unconstitutional licensing scheme—as was in effect at the time of Mr. Casas's prosecution—itself unconstitutionally burdens an individual's Second Amendment rights. Accordingly, the judgment should be reversed, and the indictment dismissed.[2]

[2] To date, this Court has not found any conviction unconstitutional under the Second Amendment. *See, e.g.*, *People v. Cisse*, ___ A.D.3d ___, 2024 N.Y. Slip Op. 03093, at *2 (1st Dep't June 6, 2024). To the extent that this Court has previously rejected the claim here, it should reconsider that decision in accordance with U.S. Supreme Court precedent.

CONCLUSION

For the foregoing reasons, the judgment should be reversed, and the indictment dismissed.

Dated: New York, New York
June 17, 2024

Respectfully Submitted,

Caprice R. Jenerson, Esq.
Attorney for Defendant-Appellant

By: Victorien Wu, Esq.
Supervising Attorney

Daniel Kenny
Law Intern

OFFICE OF THE APPELLATE DEFENDER
11 Park Place, 16th Floor
New York, NY 10007
(212) 402-4100
vwu@oadnyc.org

ADDENDA

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, - against - LAZARUS CASAS, Defendant-Appellant.	Ind. No. 71633/22

STATEMENT PURSUANT TO RULE 5531

1. The indictment number in the court below was 71633/22.

2. The full names of the original parties were "The People of the State of New York" – against – "Lazarus Casas."

3. This action was commenced in Supreme Court, New York County.

4. The action was commenced by the filing of an indictment on April 28, 2022.

5. This is an appeal from a judgment of conviction rendered on November 7, 2022, by Supreme Court, New York County. Lazarus Casas was convicted, following a guilty plea, of criminal possession of a weapon in the second degree. Penal Law § 265.03 (1)(b). Mr. Casas was sentenced to three and a half years of prison and two and a half years of post-release supervision. Justice Robert Mandelbaum presided at omnibus motion, and Justice Neil Ross presided at plea and sentencing.

6. Mr. Casas has been granted leave to appeal as a poor person on

the original record and a reproduced appellant's brief.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

LAZARUS CASAS,

Defendant-Appellant.

Ind. No.
71633/22

PRINTING SPECIFICATIONS STATEMENT

1. The following statement is made in accordance with Rule 1250.8(j) of the Practice Rules of the Appellate Division.

2. Lazarus Casas's brief was prepared on a computer in the processing system Microsoft Word 2016, with Century Schoolbook typeface, 14 point font (13 point font footnotes), and with lines double-spaced.

3. The text of the brief has a word count of 4,419 as calculated by the processing system.

Supreme Court of the State of New York
Appellate Division: First Department

The People of the State of New York, Respondent, — against — Lazarus Casas, Defendant-Appellant.	Affirmation of Service Ind. No. 71633/22

Victorien Wu, an attorney duly admitted to practice in the State of New York, hereby affirms the following under penalties of perjury:

1. I am associated with the Office of the Appellate Defender, which has been assigned to represent the defendant-appellant in the above-captioned case.

2. On June 17, 2024, I served a Note of Issue, Brief, and the record on appeal on the attorney for the respondent, the People of the State of New York, at the Office of the District Attorney, New York County, Appeals Bureau, One Hogan Place, New York, New York 10013, by electronic mail at the address provided by that office: danyappeals@dany.nyc.gov. Respondent has consented to service by electronic mail on the date of filing.

3. On the same date, I served the Brief on the Office of the Attorney General, by hand, at 28 Liberty Street, New York, New York 10005.

4. In accordance with 22 NYCRR, Part 1250.11(d)(3), I will serve upon the defendant-appellant a copy of the Brief by mail at the address designated by him.

Dated: New York, New York
June 17, 2024

Victorien Wu
Victorien Wu, Esq.

OAD OFFICE OF THE APPELLATE DEFENDER

11 Park Place, Suite 1601, New York, NY 10007 | Tel. 212 402 4100 | Fax 212 402 4199
oadnyc.org fb.com/oadnyc @oad_nyc

June 17, 2024

BY HAND

Office of the Attorney General
28 Liberty Street
New York, New York 10005

Re: *People v. Lazarus Casas,*
Ind. No. 71633/22 (New York County)

To Whom It May Concern:

Enclosed is a copy of the undersigned's submission to the Appellate Division, First Department, on behalf of Lazarus Casas, regarding the appeal of his conviction under Indictment No. 71633/22. As part of his argument, Mr. Casas is challenging the constitutionality of N.Y. Penal Law §§ 265.01-b and 265.03. *See* Brief for Defendant-Appellant.

I write to provide the Attorney General with written notice of Mr. Casas's constitutional challenge, pursuant to N.Y. Exec. Law§ 71 and N.Y. C.P.L.R. § 1012(b).

Sincerely,

Victorien Wu, Esq.
Supervising Attorney

Enclosure

cc: Appellate Division, First Department
27 Madison Avenue
New York, NY 10010

New York County District Attorney's Office
Appeals Bureau
One Hogan Place
New York, NY 10013

Appendix H

FILED: APPELLATE DIVISION - 1ST DEPT 10/01/2024 12:57 PM 2022-05191
NYSCEF DOC. NO. 16 RECEIVED NYSCEF: 10/01/2024

To be argued by
NATHAN MORGANTE
(15 MINUTES REQUESTED)

New York Supreme Court

Appellate Division - First Department

Ind. No. 71633/2022
Appellate Case No. 2022-05191

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

LAZARUS CASAS,

Defendant-Appellant.

On Appeal from the Supreme Court of the State of New York, New York County

BRIEF FOR RESPONDENT

ALVIN L. BRAGG, JR.
District Attorney
New York County
Attorney for Respondent
One Hogan Place
New York, New York 10013
(212) 335-9000
danyappeals@dany.nyc.gov

BRENT E. YARNELL
NATHAN MORGANTE
ASSISTANT DISTRICT ATTORNEYS
Of Counsel

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

LAZARUS CASAS,

Defendant-Appellant.

BRIEF FOR RESPONDENT

INTRODUCTION

Defendant Lazarus Casas appeals from a November 7, 2022 judgment of the Supreme Court, New York County (Robert M. Mandelbaum, J., at motions; Neil Ross, J., at plea and sentencing), convicting him, upon his guilty plea, of Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03[1][b]). Defendant was sentenced to a prison term of three and a half years, to be followed by two and a half years of supervised release. He is currently incarcerated on this charge.

On April 13, 2022, at approximately 7:08 p.m., defendant went to the roof of his apartment building at 201 West 83rd Street, in Manhattan, and, in an attempt to scare

three men on the street below, fired a .44 Magnum revolver into the air.[1] The next day, police recovered the gun while executing a search warrant in defendant's apartment. Defendant was then arrested.

By New York County Indictment No. 71633/2022, filed on April 28, 2022, a Grand Jury charged defendant with two counts of Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03[1][b], [3]), and one count of Criminal Possession of a Firearm (Penal Law § 265.01-b[1]). On May 19, 2022, defendant moved to dismiss those charges on the ground that they violated the Second Amendment to the United States Constitution because New York's firearm licensing requirements amounted to a "total ban" on handgun possession under *District of Columbia v. Heller*, 554 U.S. 570 (2008). On June 3, 2022, the Honorable Robert M. Mandelbaum denied defendant's motion to dismiss. On September 21, 2022, defendant pled guilty to one count of second-degree criminal possession of a weapon, in full satisfaction of the indictment. On November 7, 2022, defendant was sentenced as noted above.

On appeal, defendant claims that his prosecution for firearm possession was unconstitutional under the Supreme Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), which was issued on June 23, 2022. Defendant's *Bruen* argument is unpreserved, and this Court should not entertain it under its interest of

[1] This factual recitation is based on the pre-sentence report, the felony complaint, the felony indictment, the automatic discovery form, and the transcript of the June 29, 2022 *Wade/Dunaway* hearing.

justice jurisdiction, for defendant could easily have raised it during the three months that passed between *Bruen*'s issuance and his own guilty plea. Additionally, defendant lacks standing to challenge New York's former firearm licensing scheme because he did not allege that he applied for a license. Regardless, *Bruen* did not disturb the State's weapon-possession statutes.

THE RELEVANT RECORD

On May 19, 2022, defendant moved to dismiss the indictment, arguing that it was unconstitutional to prosecute him for violating New York's weapon possession statutes because the State's requirement that a firearm license applicant show "proper cause," former Penal Law § 400.00(2)(f), was "onerous" and "practically amount[ed] to a total ban on possessing firearms," in violation of *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Affirmation of Robert Briere in Support of Defendant's Omnibus Motion ¶¶ 33–37) ("Omnibus Motion"). In response, the People argued that the indictment did not violate defendant's Second Amendment rights, and that New York's licensing requirements "impose[d] nowhere near the burden" that flowed from the total ban (Affirmation of John Fuller in Response to the Defendant's Omnibus Motion ¶ 10). On June 3, 2022, the Honorable Robert M. Mandelbaum denied the motion and rejected defendant's argument that his weapon possession charges were unconstitutional (Decision & Order).

POINT

DEFENDANT'S *BRUEN* CLAIM IS UNPRESERVED, HE LACKS STANDING TO RAISE IT, AND REGARDLESS, IT IS MERITLESS (Answering Defendant's Brief ["DB"]).

Defendant argues that it was unconstitutional to prosecute him for possessing a firearm without a license because two provisions in New York's former firearm licensing scheme—that a firearm license could be issued only if the licensing officer determined that there was "no good cause" for denial, former Penal Law § 400.00(n); and that a concealed carry license could be issued only if the applicant showed "proper cause," former Penal Law § 400.00(2)(f)—violated the historical tradition test that the Supreme Court established in *Bruen* (DB: 19–25). These arguments are unpreserved. Regardless, they are meritless. Defendant lacks standing to challenge the licensing requirements because he did not allege that he applied for a license. And this Court has rejected the notion that *Bruen* invalidated New York's weapon-possession statutes.

A. Defendant's Current Arguments are Unpreserved.

To preserve a question of law for appellate review, counsel must lodge a "specific" objection and "apprise the court of grounds upon which the objection is based." *People v. Jackson*, 29 N.Y.3d 18, 22–23 (2017) (quoting CPL § 470.05[2]); *accord People v. Hawkins*, 11 N.Y.3d 484, 492 (2008) ("general motions simply do not create questions of law" that are preserved for appellate review). To meet that requirement, counsel's arguments below must have been "sufficiently specific" to "draw the court's

attention to the precise issue pressed" on appeal. *People v. Fortunato*, 161 A.D.2d 455, 455 (1st Dep't 1990). The specificity requirement applies just as strongly to constitutional claims. *E.g.*, *People v. Blandford*, 37 N.Y.3d 1062, 1063, 1072–73 (2021) (the general argument that a police canine sniff violated the Fourth Amendment did not preserve the specific argument that the sniff required reasonable suspicion). Moreover, preservation is especially important for *Bruen* claims, which require a "complex inquiry" into "historical analogues" that cannot be conducted without a thorough record. *People v. Cabrera*, 41 N.Y.3d 35, 50 (2023); *accord People v. Rivera*, 41 N.Y.3d 936, 939–40 (2023) (*Bruen* claim is unpreserved and unreviewable "particularly absent the development of a record in the trial court").

Here, defendant's constitutional challenge to the former licensing scheme's "no good cause" requirement is unpreserved because his motion to dismiss contained no objection to that particular provision. *See People v. Baumann.*, 6 N.Y.3d 404, 408 (2006) (a constitutional challenge is unpreserved where the lower court has not been given "an opportunity to address . . . the unconstitutionality of the challenged provision"). Rather, defendant's arguments below focused entirely on the alleged defects of the "proper cause" requirement (*see* Omnibus Motion ¶ 34), which was a completely different provision of the former licensing scheme. *See, e.g.*, *People v. Cona*, 49 N.Y.2d 26, 33 (1979) (where "no objection was made to that portion of the court's charge," defendants "failed to preserve a question of law as to the correctness of that portion of the charge"); *People v. Vasquez*, 66 N.Y.2d 968, 970 (1985) (defendant's argument that

certain police conduct during a traffic stop violated his Fourth Amendment rights did not preserve the claim that his rights were also violated by other police conduct). By failing to even mention the "no good cause" requirement below, defendant did not alert the court that he was also challenging that separate licensing requirement.

Further, defendant's complaint that the proper cause requirement fails *Bruen*'s historical tradition test is also unpreserved because defendant did not alert the trial court that he was challenging the proper cause requirement on that particular ground. Indeed, defendant's only argument below was that the proper cause requirement was so "onerous" that it approximated the "total ban" on firearm possession that the Supreme Court invalidated in *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Omnibus Motion ¶¶ 34–36). That argument could be easily discarded because it had previously been rejected by both state and federal courts. *E.g.*, *Kachalsky v. County of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012) ("New York's proper cause requirement does not operate as a complete ban on the possession of handguns in public."); *Matter of Corbett v. City of New York*, 160 A.D.3d 415, 416 (1st Dep't 2018) ("New York's handgun licensing scheme does not impose any blanket or near-total ban on gun ownership and possession."). And *Bruen* did not disturb prior findings that the proper cause requirement was less onerous than the total ban on handgun possession. *See Bruen*, 597 U.S. at 18–19. Rather, *Bruen* struck down the proper cause requirement under the newly enacted historical tradition test, which constituted a "dramatic change" in Second Amendment jurisprudence, requiring courts to focus entirely on comparisons between modern

statutes and their historical analogues. *Cabrera*, 41 N.Y.3d at 46; *accord People v. Garcia*, 41 N.Y.3d 62, 75–76 (2023) (Rivera J., dissenting) (*Bruen*'s establishment of the historical tradition test was a "sea change"). Where a party litigates a constitutional claim "within the framework of [] existing precedent," its arguments on appeal are limited to those it raised below. *People v. Gates*, 31 N.Y.3d 1028, 1029 (2018). By focusing his arguments on pre-*Bruen* caselaw concerning the onerousness of firearm regulations, defendant did not alert the court to the need for engaging in *Bruen*'s "complex inquiry" of "closely analyzing historical analogues to assess whether our modern regulations are consistent with historical tradition." *Cabrera*, 41 N.Y.3d at 50.

This Court should decline to review defendant's unpreserved *Bruen* claim in the interest of justice. Indeed, this Court has repeatedly refused to exercise its interest-of-justice jurisdiction in prior cases involving unpreserved *Bruen* claims. *See People v. Liriano*, 226 A.D.3d 520, 520 (1st Dep't 2024); *People v. Hibbert*, 222 A.D.3d 492, 493 (1st Dep't 2023); *People v. Quiles*, 217 A.D.3d 635, 636 (1st Dep't 2023). Here, entertaining defendant's unpreserved *Bruen* claim would not serve the interest of justice because *Bruen* was decided while this case was still pending. Thus, defendant could have moved to renew his motion to dismiss in light of the intervening "change in the law." *People v. Trump*, 82 Misc.3d 1233(A), at *1 (N.Y. Cty. Sup. Ct. Feb. 23, 2024) (quoting CPLR Rule 2221[3][2]). Because he chose not to, the court and the People never had an opportunity to "develop[] . . . a record that would allow for careful and deliberate adjudication on the merits of [defendant's] constitutional challenge[]" to the weapon-

possession statutes following the sea change in law that caused the proper cause requirement to be struck down. *Cabrera*, 41 N.Y.3d at 50. Moreover, as discussed below, interest of justice jurisdiction would not help defendant because he cannot prevail on his *Bruen* claim.

B. Defendant Lacks Standing to Challenge New York's Firearm Licensing Statute Because He Has Not Alleged That He Applied for a License.

Defendant's argument is essentially that, under *Bruen*, the firearm licensing scheme in former Penal Law § 400.00 was unconstitutional, and thus, the statutes criminalizing possession of a gun without a license must also be unconstitutional (DB: 19–25). But as this Court has repeatedly held, a defendant lacks standing to raise a collateral constitutional challenge where the defendant never applied for a license. *People v. Castillo*, 226 A.D.3d 573, 574 (1st Dep't 2024); *Liriano*, 226 A.D.3d at 521; *People v. Rodriguez*, 226 A.D.3d 459, 460 (1st Dep't 2024); *People v. Johnson*, 225 A.D.3d 453, 455 (1st Dep't 2024); *see also United States v. Decastro*, 682 F.3d 160, 164 (2d Cir. 2012) (defendant who "failed to apply for a gun license in New York" "lacks standing to challenge the licensing laws"). Here, there is no indication in the record that defendant ever applied for a license. Therefore, defendant lacks standing to bring this claim.[2]

[2] Although the trial court did not explicitly address defendant's lack of standing to challenge the firearm licensing scheme, this Court may affirm on that ground because standing was a component of his motion to dismiss the weapon-possession charges. *See, e.g.*, *People v. Ladson*, 236 A.D.2d 217, 217 (1st Dep't 1997) (although trial court did not address defendant's lack of standing to challenge search, appellate court could affirm denial of suppression on that ground because "the 'adverse' ruling that may be considered by this Court on appeal . . . is the
(Continued…)

Defendant's failure to apply for a license is no mere technical defect. Contrary to defendant's contention (DB: 15), *Bruen* did not strike down New York's licensing scheme wholesale. Rather, the decision invalidated only one feature of that scheme: the requirement in Penal Law § 400.00(2)(f) that an applicant show "proper cause" before receiving an unrestricted concealed-carry handgun license. *Bruen*, 597 U.S. 79 (Kavanaugh, J., concurring). But because defendant never submitted to this State's licensing scheme, there is no reason to believe that he would have been denied a license due to the absence of proper cause as opposed to one of the other grounds for ineligibility in Penal Law § 400.00 that *Bruen* did not disturb. *See* Penal Law §§ 400.00(1)(c)–(n).

Additionally, in this case, the record indicates that, if defendant had applied for a firearm license, his application would have likely been denied on constitutional grounds. For starters, defendant would have been ineligible for a firearm license because he had a prior conviction for a "serious offense." *See* Penal Law §§ 400.00(1)(c), (1-b).[3] In 2015, defendant was convicted of Criminal Possession of a Weapon in the Fourth Degree (Penal Law § 265.01[1]), which is a serious offense under

court's denial of suppression of the handgun, including the component issue of standing"); *People v. Myers*, 303 A.D.2d 139, 140 (2d Dep't 2003) (same); *see also People v. Garrett*, 23 N.Y.3d 878, 885 n.2 (2014) (where trial court did not "expressly state" whether defendant satisfied materiality prong of "the multipronged *Brady* standard," but denied *Brady* claim for failure to satisfy other prongs, appellate court could affirm based on non-materiality).

[3] At the time of defendant's arrest, the relevant Penal Law provisions were contained in Sections 400.00(1)(c) and (1-a).

the Penal Law. *See Matter of Feerick v. McGuire*, 159 A.D.3d 1155, 1156 (3d Dep't 2018) (criminal possession of a weapon in the fourth degree falls under the statutory definition of "serious offense"); *see also* Penal Law § 265.00(17)(a) (defining "serious offense"). That alone would have compelled the licensing officer to deny defendant's application. Defendant's own responses during his pre-sentence interview with the Probation Department suggest that he might have been ineligible for a firearm license on the ground that he was an unlawful user of or addicted to a "controlled substance" under federal law, a category that includes marijuana. *See* Penal Law § 400.00(1)(e); 21 U.S.C. §§ 802, 812. During the interview, defendant reported that he had been smoking one eighth of an ounce of marijuana each day since he was 17 years old (PSR: 5).

Defendant cannot evade this problem by asserting that *Bruen* categorically barred States from denying licenses to illegal drug users with prior weapon-possession convictions because *Bruen* said no such thing. To the contrary, the Supreme Court expressly endorsed license requirements that "ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.'" *Bruen*, 597 U.S. at 38 n.9; *see also Heller*, 554 U.S. at 626 ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons"). Thus, nothing in *Bruen* calls into question New York's rules denying firearms licenses to illegal drug users with prior weapon possession convictions, for those rules are objective and intended to ensure that license holders are law-abiding citizens.

Accordingly, defendant lacks standing because he has not demonstrated any connection between *Bruen's* holding and his conviction. *See Castillo*, 226 A.D.3d at 574 (defendant lacked standing to challenge New York's firearms licensing scheme because he did not apply for a firearms license); *Liriano*, 226 A.D.3d at 521 (same); *Rodriguez*, 226 A.D.3d at 460 (same); *Johnson*, 225 A.D.3d at 455 (same).

On appeal, defendant attempts to import First Amendment jurisprudence into Second Amendment caselaw, citing *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 148, 159 (1969) and *Staub v. City of Baxley*, 355 U.S. 313, 319 (1958) in support of his argument that his failure to apply for a firearm license should not prevent him from challenging the licensing requirements now (DB: 22–24). Defendant's reliance on *Shuttlesworth* and *Staub* is misplaced. Those cases dealt specifically with the First Amendment's protection of freedom of expression, and it was in the context of the First Amendment that the Court held that individuals could ignore laws that subjected them to unconstitutional prior restraint through licensing requirements. *Shuttlesworth*, 394 U.S. at 150-51; *Staub*, 355 U.S. at 325. In contrast, *Bruen* made clear that prior restraint laws that regulate firearms are not presumptively unconstitutional. *Compare Bruen*, 597 U.S. 38 n.9 ("[T]he Court's decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense"), *with New York Times v. United States*, 403 U.S. 713, 714 (1971) ("Any system of prior restraints of *expression* comes to this Court bearing a heavy presumption against its constitutional validity") (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 [1963]) (emphasis added). Thus,

as there are significant differences between the rights at issue, there is no reason to apply First Amendment law to defendant's case.

In short, it is well settled that defendant's failure to apply for a license means he lacks standing to challenge the State's licensing scheme.

C. *Bruen* Did Not Disturb New York's Weapon-Possession Statutes.

The trial court properly rejected defendant's argument that his weapon-possession charges violated the Second Amendment. Defendant challenges that conclusion by asking this Court to "reconsider" its recent decision in *People v. Cisse*, 228 A.D.3d 440 (1st Dep't 2024), which rejected a similar Second Amendment claim (DB: 25 n.2). However, there is no reason for this Court to overturn its recent caselaw on this issue. Indeed, this Court has repeatedly rejected the notion that *Bruen* disturbed any weapon-possession convictions. *E.g.*, *Castillo*, 226 A.D.3d at 575; *Liriano*, 226 A.D.3d at 521; *Rodriguez*, 226 A.D.3d at 460; *Johnson*, 225 A.D.3d at 455; *see also People v. Mancuso*, 225 A.D.3d 1151, 1153 (4th Dep't 2024) ("the decision in *Bruen* 'had no impact on the constitutionality of New York State's criminal possession of a weapon statutes'") (quoting *People v. Joyce*, 219 A.D.3d 627, 628 (2d Dep't 2023)).

Indeed, defendant's argument fundamentally misconstrues *Bruen*. In that regard, *Bruen* did not declare New York's entire firearm licensing scheme to be invalid; rather, it merely addressed one aspect of that scheme: namely, the "proper cause" requirement for obtaining a concealed carry license. *See* Penal Law § 400.00(2)(f). And although *Bruen* held that this specific licensing requirement was incompatible with the Second

Amendment, the Court made clear that States could continue to impose other licensing requirements to "ensure" that "those bearing arms in the jurisdiction are, in fact, 'law abiding, responsible citizens.'" *Bruen*, 597 U.S. at 38 n.9 (internal citation and quotation marks omitted); *see also id.* at 79 (Kavanaugh, J. concurring) ("[T]he Court's decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense"). Thus, nothing in *Bruen* addressed or disturbed New York's many other requirements for obtaining a firearm license—such as the age, mental health, or criminal history requirements contained in Penal Law § 400.00(1).

And, because the "proper cause" requirement could be easily cut from former Penal Law § 400.00, the remainder of New York's licensing scheme was unaffected by *Bruen*. As the Court of Appeals has recognized, "unconstitutional subdivisions" of a state statute "may be severed from the valid and the remainder of the statute preserved." *People v. Viviani*, 36 N.Y.3d 564, 583 (2021) (quoting *Westinghouse Elec. Corp. v. Tully*, 63 N.Y.2d 191, 196 [1984]). Severance is a question of state law that turns on whether, if the Legislature had "foreseen" the "partial invalidity" of the statute in question, that body "would have wished the statute to be enforced with the valid part exscinded, or rejected altogether." *Id.* (quoting *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60 [1920]); *see also City of New Orleans v. Dukes*, 427 U.S. 297, 302 (1976); *People v. Mancuso*, 255 N.Y. 463, 472 (1931); *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 389 (2d Cir. 2000). The answer to that question "must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory

rule will function if the knife is laid to the branch instead of at the roots." *Viviani*, 36 N.Y.3d at 583 (quoting *Alpha Portland Cement Co.*, 230 N.Y. at 60).

Here, there can be no question that the Legislature would not have jettisoned New York's entire licensing scheme if it had been forewarned that the "proper cause" requirement for a concealed-carry license would be deemed unconstitutional. And there is no need to guess the Legislature's intent because, in fact, the Legislature did not jettison the entire licensing scheme after *Bruen* was decided. Instead, it enacted legislation that merely excised the "proper cause" provision and buttressed the rest of the licensing scheme with requirements to ensure that only law-abiding citizens would be granted concealed-carry permits. *See* L.2022, ch. 371, § 1. Common sense dictates that the "proper cause" requirement should be severed from the remainder of the statute, leaving the other requirements intact.

This conclusion is all the more clear when considering the statutory scheme as a whole. The "proper cause" requirement was limited to applications for licenses to "carry concealed [a pistol or revolver], without regard to employment or place of possession." Former Penal Law § 400.00(2)(f). There was no requirement to show "proper cause" for the issuance of any other type of firearms licenses. *See* former Penal Law §§ 400.00(2)(a)-(2)(e), (2)(g). It beggars belief that the Legislature would have opted to do away with the multitude of different types of licenses for individuals in different circumstances, and allow unrestricted firearms possession, simply because a single requirement for a single type of license would be struck down.

The "no good cause" requirement was also severable. Again, this Court does not need to guess whether the Legislature would have kept the remainder of the licensing scheme absent this requirement, because as defendant observes (DB: 20), the Legislature did exactly that: when it removed the "proper cause" requirement from the licensing scheme following the decision in *Bruen*, it also removed the "no good cause" requirement, but left the other requirements intact. *See* L.2022, ch. 371, § 1. Indeed, the federal case that struck down the "no good cause" requirement in the licensing statute's implementing regulation in the New York City Administrative Code, which largely mirrors the statute, held that the other provisions were severable. *Srour v. New York City*, 699 F. Supp.3d 258, 286–87 (S.D.N.Y. 2023).

Thus, there is no basis for defendant's claim (DB: 15, 19) that *Bruen* invalidated the entirety of New York's firearms licensing scheme. And, because the licensing scheme—minus the "proper cause" and "no good cause" requirements—remained intact, so did the Penal Law provisions outlawing unlicensed possession of a firearm. *See People v. Williams*, 76 Misc.3d 925, 927 (Sup. Ct. Kings Cty. 2022) ("as expressly stated in *Bruen*, states maintain the right under the Federal Constitution to require gun licenses for lawful possession"); *People v. Caldwell*, 76 Misc.3d 997, 1002 (Sup. Ct., Queens Cty. 2022) (apart from the proper-cause requirement, "*Bruen* did not invalidate any other provision of New York's licensing scheme or any of the offenses under the Penal Law criminalizing unlicensed possession of a firearm").

Additionally, defendant's attempt to invoke the historical tradition test founders because he cannot show that the weapon-possession statutes were unconstitutional as applied to him. *See United States v. Jackson*, 110 F.4th 1120, 1129 (8th Cir. 2023) (criminal defendant's Second Amendment challenge to federal weapon-possession statute failed where statute was constitutional as applied to him). "[A] person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others." *Decastro*, 682 F.3d at 163. Here, defendant's constitutional challenge to the weapon-possession statutes turns on the argument that two requirements in the former licensing scheme ran afoul of *Bruen*'s historical tradition test. But as discussed *supra* pp. 9–10, the licensing officer would not have needed to consider those requirements because defendant was ineligible for a license based on grounds that *Bruen* did not disturb. This Court need not address requirements that the licensing officer would not have needed to reach in order to issue a final determination on defendant's hypothetical license application.

* * *

In sum, defendant's *Bruen* arguments are unpreserved, and he lacks standing to challenge New York's firearm licensing requirements because he never applied for a license. Regardless, *Bruen* did not preclude New York from prosecuting defendant for possessing a firearm without a license.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ALVIN L. BRAGG, JR.
District Attorney
New York County
danyappeals@dany.nyc.gov

BRENT E. YARNELL
NATHAN MORGANTE
Assistant District Attorneys
Of Counsel

October 2024

PRINTING SPECIFICATIONS STATEMENT

The word count for this brief is 4118, excluding the Table of Contents and Table of Authorities. The word processing system used to prepare this brief and to calculate the word count was Microsoft Word 2016. The brief is printed in Garamond, a serifed, proportionally spaced typeface. The type size is 14 points in the text and headings, and 13 points in the footnotes.

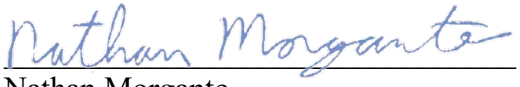
SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, -against- LAZARUS CASAS, Defendant-Appellant.	AFFIRMATION OF SERVICE Docket No.: 2022-05191 Ind. No. : 71633/2022

Nathan Morgante, an attorney duly admitted to practice before the courts of this State, affirms that:

On October 1, 2024, I served a copy of the Respondent's Brief on the Attorney for the Defendant-Appellant in the above-caption case at the following e-mail addresses vwu@oadnyc.org. Counsel for Defendant-Appellant has consented to accept digital service of the brief.

Dated: New York, New York
October 1, 2024



Nathan Morgante
Assistant District Attorney
(212) 335-3819
morganten@dany.nyc.gov

Appendix I

FILED: APPELLATE DIVISION - 1ST DEPT 10/11/2024 10:30 AM 2022-05191
NYSCEF DOC. NO. 18 RECEIVED NYSCEF: 10/11/2024

To be argued by
Victorien Wu
15 minutes requested

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION: FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

LAZARUS CASAS,

Defendant-Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT LAZARUS CASAS

Ind. No. 71633/22 (New York County)
App. Case No. 2022-05191

CAPRICE R. JENERSON, ESQ.
Attorney for Defendant-Appellant

By: VICTORIEN WU, ESQ.
Supervising Attorney

OFFICE OF THE APPELLATE DEFENDER
11 Park Place, 16th Floor
New York, NY 10007
(212) 402-4100
vwu@oadnyc.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Session Laws

ARGUMENT

POINT

CONTRARY TO RESPONDENT'S CONTENTION, THE INDICTMENT SHOULD BE DISMISSED AS VIOLATIVE OF THE SECOND AMENDMENT.

There is no dispute that the "proper cause" and "no good cause" provisions that were part of New York's firearm licensing regime in April 2022—and that were indispensable requirements for obtaining a license for public carry and in-home possession—were unconstitutional. Yet, respondent insists that the licensing regime could be enforced by way of the criminal charges in this case. Respondent's arguments do not withstand scrutiny, and the indictment should be dismissed. U.S. Const. amends. II, XIV.

A. Mr. Casas Preserved His Second Amendment Challenge to the Indictment.

Mr. Casas's Second Amendment challenge to the indictment is preserved for review as a question of law because the issue was raised by Mr. Casas and decided by the court below. *See* C.P.L. § 470.05(2). In his motion to dismiss the indictment, Mr. Casas contended that Penal Law §§ 265.01 and 265.03 are unconstitutional because the provisions impose "criminal sanctions" on those trying to exercise their Second

Amendment rights "without first obtaining a permit through New York's onerous . . . licensing permit scheme." Omnibus Mot. at 10. In so doing, Mr. Casas specifically argued that the licensing regime "for both 'in the home/and or business' [possession and] to carry outside the home are too onerous . . . to comport with the Second Amendment's right of individuals to keep a loaded pistol in the home for protection [and] to carry outside of the home for protection." *Id.* The court below denied this motion. Omnibus Decision at 1.

On appeal, respondent contends that Mr. Casas limited his Second Amendment claim to only the "proper cause" requirement for public carry and not the "no good cause" requirement for in-home possession. Resp. Br. at 5-6. That is incorrect. As noted, in moving to dismiss the indictment, Mr. Casas challenged the licensing regime for both public carry and in-home possession. *See* Omnibus Mot. at 10; *see also id.* at 9 (arguing that the licensing requirement for "hav[ing] a firearm even inside of [one's] home" is "so restrictive" as to "violate the 2nd Amendment"). And critically, in ruling on Mr. Casas's motion, the trial court itself considered the constitutionality of the "proper cause" and "no good cause" provisions. Indeed, in denying Mr. Casas's motion to

dismiss, the court cited the specific portion of the Second Circuit's decision in *Libertarian Party of Erie County v. Cuomo*, 970 F.3d 106 (2d Cir. 2020), which analyzed the constitutionality of both requirements. *See* Omnibus Decision at 1 (citing *Libertarian Party of Erie Cnty.*, 970 F.3d at 127-28). In particular, in the passage cited by the trial court, the Second Circuit addressed not only the "proper cause" provision, but also the "no good cause" requirement for "obtaining an at-home permit," and the Second Circuit held that the provisions "d[id] not unduly burden [the] Second Amendment right to bear arms." *Libertarian Party of Erie Cnty.*, 970 F.3d at 127-28. Because the trial court adopted the Second Circuit's ruling on this issue, it is preserved for appellate review. *See People v. Feingold*, 7 N.Y.3d 288, 290 (2006); *People v. Prado*, 4 N.Y.3d 725, 726 (2004); *People v. Jennings*, 69 N.Y.2d 103, 124 n.9 (1986).

In any event, there is no dispute that Mr. Casas also challenged the "proper cause" requirement. *See* Resp. Br. at 5. The issue of whether that provision was constitutional under the Second Amendment was thus squarely presented to the court below. *See* Omnibus Mot. at 9.

Still, respondent claims that Mr. Casas's constitutional claim as to the "proper cause" requirement is unpreserved because Mr. Casas did

not frame it as an argument under *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022). Resp. Br. at 6. This contention ignores the fact that, at the time that Mr. Casas filed his motion to dismiss, *Bruen* had not yet been decided. Moreover, in moving to dismiss the indictment, Mr. Casas argued that the "proper cause" requirement was "onerous," and that it "violate[d] the Second Amendment[] right to bear arms." Omnibus Mot. at 9.[1] Mr. Casas thus correctly forecasted the Supreme Court's subsequent ruling that the "proper cause" provision "imposed a substantial burden," "tantamount to a ban," in violation of the Second Amendment. *Bruen*, 597 U.S. at 50, 59. And Mr. Casas gave "the trial court [the] opportunity to address the [issue] and to take corrective [action]." *People v. Lopez*, 71 N.Y.2d 662, 665-66 (1988).

Respondent asserts that Mr. Casas's challenge to the validity of the "proper cause" requirement is nonetheless unpreserved because he did not file a motion for leave to renew the motion to dismiss after

[1] Contrary to respondent's assertion, Mr. Casas's suggestion that the licensing requirement for in-home possession amounted to a total ban was not his "only" argument. Resp. Br. at 6 (citing Omnibus Mot. at 9). Instead, Mr. Casas also asserted that the licensing regime for public carry and in-home possession (including the "proper cause" requirement for public carry) were "onerous" in violation of the Second Amendment. Omnibus Mot. at 9-10.

Bruen was decided. Resp. Br. at 2-3, 6-8. Respondent contends that this denied the trial court of the chance to consider *Bruen*. *Id.* at 7-8. However, respondent cites no case law for the proposition that a properly preserved constitutional challenge somehow becomes unpreserved if the trial court did not have the opportunity to apply a U.S. Supreme Court decision rendered after the trial court's ruling.[2] Indeed, as precedent establishes, a constitutional claim remains preserved, and the new governing legal framework applicable, even if the trial court did not address the issue through the same lens. *See, e.g.*, *People v. Scott*, 70 N.Y.2d 420, 422-26 (1987) (defendant's Fourteenth Amendment claim remained preserved, and the Court of Appeals applied *Batson v. Kentucky*, 476 U.S. 79 (1986), to resolve it, even though the trial court applied *Swain v. Alabama*, 380 U.S. 202 (1965),

[2] Respondent's argument also ignores the fact that a motion for leave to renew would have been submitted to Justice Mandelbaum. *See* C.P.L.R. 2221(a) (motion to renew must be made to "the judge who signed the [prior] order"). And on July 15, 2022, within weeks of *Bruen*, Justice Mandelbaum took the unusual step of issuing a published opinion to reject the argument that *Bruen* rendered the enforcement of New York's pre-*Bruen* firearm licensing regime unconstitutional. *See People v. Rodriguez*, 76 Misc. 3d 494, 495-99 (Sup. Ct. N.Y. Cnty. 2022). Because Justice Mandelbaum thus "made [his] position clear," defense counsel was not required to make "further protest." *People v. Mezon*, 80 N.Y.2d 155, 161 (1992); *see also People v. Finch*, 23 N.Y.3d 408, 413 (2014) ("[A] lawyer is not required, in order to preserve a point, to repeat an argument that the court has definitively rejected.").

and its progeny); *see also People v. Hardy*, 4 N.Y.3d 192, 194-98 & n.3 (2005) (defendant's Sixth Amendment claim remained preserved, and the Court of Appeals applied *Crawford v. Washington*, 541 U.S. 36 (2004), to resolve it, even though the trial court applied *Ohio v. Roberts*, 448 U.S. 56 (1980), and its progeny). Notably, even if the new U.S. Supreme Court decision is rendered while the case is pending in the trial court, the appropriate procedure on appeal is not to find that a duly preserved constitutional claim is somehow unpreserved, but rather to address the merits of the question or, if appropriate, hold the appeal in abeyance and remit the matter for further consideration. *See, e.g.*, *People v. Baker*, 163 A.D.2d 188, 188-89 (1st Dep't 1990).[3]

Contrary to respondent's suggestion, *People v. Gates*, 31 N.Y.3d 1028 (2018), and *People v. Cabrera*, 41 N.Y.3d 35 (2023), do not support its argument that Mr. Casas's Second Amendment claim is unpreserved. In *Gates*, after affirming the Appellate Division's determination that suppression was warranted under *People v. De Bour*, 40 N.Y.2d 210 (1976), the majority on the Court of Appeals

[3] Accordingly, this Court may also remit this case for further proceedings. *See, e.g.*, *Baker*, 163 A.D.2d at 188-89.

declined to opine on the dissent's suggestion that *De Bour* should be reconsidered, noting that the prosecution itself had not raised the issue on its appeal. *See Gates*, 31 N.Y.3d at 1029. Thus, far from being a case about preservation, *Gates* simply stands for "the principle of party presentation" whereby courts "rely on the parties to frame the issues for decision." *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020). Respondent's reliance on *Cabrera* is also misplaced because the defendant there did not file a motion to dismiss the indictment based on the Second Amendment, as Mr. Casas did here. *Cabrera*, 41 N.Y.3d at 42.[4]

B. Respondent's Argument that Mr. Casas Lacks Standing to Challenge the Indictment on Second Amendment Grounds Is Procedurally Barred and Meritless.

Respondent asserts that Mr. Casas does not have standing to raise a constitutional challenge because there is no indication that he applied for a firearm license. Resp. Br. at 8. This argument is procedurally barred and meritless.

---

[4] Although Mr. Casas's Second Amendment challenge is preserved, this Court may also address it in the interest of justice. *See, e.g.*, *People v. Allen*, 213 A.D.3d 73, 75, 81 (1st Dep't 2023). In urging otherwise, respondent contends that the issue is unpreserved. Resp. Br. at 7-8. However, this Court may exercise its interest of justice jurisdiction regardless of preservation. *See* C.P.L. § 470.15(6)(a); *see also Allen*, 213 A.D.3d at 75, 81.

While respondent emphasizes that this Court is not precluded by C.P.L. § 470.15(1) and *People v. LaFontaine*, 92 N.Y.2d 470 (1998), from reviewing its contention about standing, *see* Resp. Br. at 8-9 n.2, respondent overlooks the independent—and critical—problem that its argument is unpreserved. Indeed, in response to Mr. Casas's motion to dismiss the indictment on Second Amendment grounds, the prosecution did not raise any claim that Mr. Casas lacked standing because he had not applied for a license. Omnibus Response at 5-6. Instead, the prosecution asserted that the licensing regime was constitutional. *Id.* Accordingly, respondent's newly raised contention is unpreserved for this Court's review. *See People v. Hunter*, 17 N.Y.3d 725, 727-28 (2011) (holding that "the Appellate Division erred in entertaining" respondent's claim that defendant did not have standing, where the prosecution "did not assert a claim that defendant lacked standing" in the trial court and thus "failed to preserve the issue").

The prosecution's failure to raise the issue of standing in response to Mr. Casas's motion also fatally undermines respondent's argument on the reach of *LaFontaine*. While respondent cites *People v. Ladson*, 236 A.D.2d 217 (1st Dep't 1997), and *People v. Myers*, 303 A.D.2d 139

(2d Dep't 2003), for the notion that C.P.L. § 470.15(1) does not foreclose affirmance on grounds of standing, *see* Resp. Br. at 8-9 n.2, respondent ignores the fact that in both cases, the prosecution duly preserved the issue of standing in the trial court. *See Ladson*, 236 A.D.2d at 217 (reaching the argument because "the issue of standing . . . was properly preserved by the prosecution"); *see also Myers*, 303 A.D.2d at 142 (noting that at the hearing, the prosecution "argued that the defendant had no expectation of privacy").[5] Respondent's suggestion that it may circumvent C.P.L. § 470.15(1)'s limitation by raising an issue that the trial court did not address and *that the prosecution failed to preserve* is contrary to precedent. *See People v. Santiago*, 91 A.D.3d 438, 439 (1st Dep't 2012) (rejecting alternative ground for affirmance because C.P.L. § 470.15(1) precludes review of an argument that "the People were required to preserve . . . and failed to do so").

[5] Similarly, in *People v. Garrett*, 23 N.Y.3d 878 (2014), the prosecution argued in response to the defendant's motion to vacate the judgment that, even if it had knowledge of the evidence at issue, "the information did not constitute *Brady* material," *id.* at 883, and thus, the question of whether the evidence was material under *Brady* was itself preserved. *Id.* at 885 n.2 (noting that *LaFontaine* does not prevent us from reviewing all *preserved* aspects of the *Brady* issue" (emphasis added)).

Finally, respondent's argument on standing is also meritless. The U.S. Supreme Court has held that criminal defendants have standing to challenge the facial invalidity of the licensing regimes that underpin their prosecution, as Mr. Casas did here. *See, e.g.*, *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 151 (1969) (holding that defendant had standing to challenge statute that criminalized participating in public parades or demonstrations without first obtaining a permit, even though he did not apply for one); *Staub v. City of Baxley,* 355 U.S. 313, 319 (1958) ("The decisions of this Court have uniformly held that the failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review in this Court of a judgment of conviction under such an ordinance.").

Respondent asserts that *Shuttlesworth* and *Staub* do not apply because they involve First Amendment rights. Resp. Br. at 11-12.[6] But, just as the Supreme Court has recognized that the right to free speech is presumptively assured, such that the government bears the burden to

[6] Respondent incorrectly suggests that Mr. Casas raised the issue of standing in his opening brief. Resp. Br. at 11. Because the prosecution below did not argue standing, Mr. Casas did not do so in his opening brief. Instead, as the opening brief makes plain, Mr. Casas discussed *Shuttlesworth* and *Staub* to establish that when a licensing regime is unconstitutional, any attempt to enforce it is also unconstitutional. *See* Opening Br. at 22-24.

justify a prior restraint, *see N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971), so has the Supreme Court held that the right to possess a firearm is "presumptively protect[ed]," and the government bears the burden of "justifying its [licensing] regulation." *Bruen*, 597 U.S. at 24. In fact, in *Bruen*, the Supreme Court repeatedly emphasized that the Second Amendment right to bear arms must be protected in the same way as the First Amendment right to free speech. *Id.* at 24-25, 70-71.

Moreover, respondent's contention ignores the fact that the U.S. Supreme Court has held that an individual who faces a criminal prosecution need not submit to a facially invalid licensing regime to raise other constitutional claims. *See, e.g.*, *Smith v. Cahoon*, 283 U.S. 553, 556-57, 562 (1931) (defendant had standing to raise facial challenge to statute on due process and equal protection grounds even though he "did not apply for a certificate"). As the Supreme Court has explained, in such a circumstance, where "an attempt is made to enforce [the law's] penalties," the individual "is in jeopardy," and "[t]he question

of the validity of the statute, upon which the prosecution is based, is [properly] presented." *Id.* at 562.[7]

C. Respondent's Argument that Mr. Casas Would Have Been Otherwise Ineligible for a Firearm License Is Procedurally Barred and Meritless.

Respondent does not dispute that the "proper cause" and "no good cause" requirements that were part of New York's firearm licensing regime in April 2022 were unconstitutional. The U.S. Supreme Court in *Bruen* confirmed that the "proper cause" provision violated the Second

---

[7] Contrary to respondent's suggestion, *United States v. Decastro*, 682 F.3d 160 (2d Cir. 2012), does not conflict with the rule established by the U.S. Supreme Court. While the Second Circuit held that the defendant lacked standing to raise his "as applied" challenge, *id.* at 163-64, the Second Circuit addressed the merits of his "facial" challenge even though he did not apply for a firearm license, *id.* at 164-69. That decision accords with the rule set forth in *Smith*, *Staub*, and *Shuttlesworth*.

Notably, in *People v. Garcia*, 41 N.Y.3d 62 (2023), Judge Rivera, the only member of the Court of Appeals to address the issue of standing, agreed that "[w]hen evaluating standing in criminal cases, the Supreme Court has consistently held that when a defendant is being prosecuted based on a licensing scheme challenged as unconstitutional, . . . it is the fact of the prosecution that confers standing." *Id.* at 74 (Rivera, J., dissenting). Thus, an individual "has standing to challenge the basis for his conviction even though he did not apply for a New York license to possess [a] gun." *Id.*

While this Court has claimed otherwise, the Court of Appeals has granted leave to review this Court's decision. *See People v. Johnson*, 225 A.D.3d 453 (1st Dep't 2024), *leave granted*, 42 N.Y.3d 939 (2024). Accordingly, should this Court ignore respondent's lack of preservation, and exceed the scope of its review power under C.P.L. § 470.15(1), this Court should revisit its ruling on standing and bring itself into compliance with U.S. Supreme Court precedent on this issue.

Amendment, 597 U.S. at 11, and the Legislature repealed the indistinguishable "no good cause" provision soon thereafter. *See* L. 2022, ch. 371, § 1. Instead, respondent argues that the "proper cause" and "no good cause" provisions can be severed, and the rest of the licensing regime can be constitutionally enforced, because Mr. Casas was ineligible for a license based on two other criteria—namely, his misdemeanor conviction for criminal possession of a weapon in the fourth degree and his prior use of marijuana. Resp. Br. at 9-10, 14-16 (citing Penal Law § 400.00(1)(c), (e)). Respondent's contention is procedurally barred and meritless.

As an initial matter, in response to Mr. Casas's motion to dismiss, the prosecution did not argue that he was ineligible for a license for any other reason. Omnibus Response at 5-6. Consequently, respondent's argument is unpreserved, *see Hunter*, 17 N.Y.3d at 727-28, and beyond the power of this Court to review under C.P.L. § 470.15(1), *see Santiago*, 91 A.D.3d at 439.

Respondent's suggestion that Mr. Casas could be constitutionally denied a license based on his misdemeanor conviction and history of marijuana usage is also entirely conclusory and, thus, meritless. The

U.S. Supreme Court has held that the burden is on "[t]he government [to] justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24. In this case, even as it attempts to advance an entirely new contention that Penal Law § 400.00(1)(c) and (e) can be constitutionally applied to Mr. Casas, respondent makes no effort to follow the holding of *Bruen* and show that these additional restrictions are "consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24. Because respondent "ha[s] not met [its] burden to identify an American tradition justifying [these] requirement[s]," its bald assertion must fail. *Id.* at 70.

Finally, even if respondent had sought to engage in the requisite analysis, it would not have been able to meet its burden. To begin, as respondent implicitly concedes, Mr. Casas's prior conviction was not for a felony, but rather for a misdemeanor. Resp. Br. at 9-10.[8] Thus, respondent's reliance on the U.S. Supreme Court's remark in *District of*

[8] Mr. Casas was convicted of criminal possession of a weapon in the fourth degree, Penal Law § 265.01(1). *See* New York State Criminal Inquiry System (Case No. 2015NY042351). After his arrest on July 2, 2015, Mr. Casas was released the next day, July 3, 2015, on his own recognizance, and at the next appearance, on August 11, 2015, he received a sentence of time served. *Id.*

Columbia v. Heller, 554 U.S. 570 (2008), that its opinion did not "cast doubt on longstanding prohibitions on the possession of firearms by *felons*" is misplaced. Resp. Br. at 10 (quoting *Heller*, 554 U.S. at 626) (emphasis added). Indeed, even before *Bruen*, courts had already recognized that a misdemeanor offense for possession of a weapon without a license is not among those types of offenses that "historically led" to firearm dispossession. *Binderup v. U.S. Attorney General*, 836 F.3d 336, 340, 356-57 (3d Cir. 2016) (en banc); *see also id.* at 353 (plurality opinion) (individual convicted of misdemeanor for carrying a handgun without a license was "distinguish[able]" from "persons historically excluded from the right to arms"); *id.* at 375 (Hardiman, J., concurring in part and concurring in the judgment) (agreeing that "[d]ispossession on the basis of [such misdemeanor] conviction" does not comport with "the original public understanding of the scope of the right to keep and bear arms"); *Clark v. Sessions*, 336 F. Supp. 3d 535, 538, 545 (W.D. Pa. 2018) (holding that individual convicted of misdemeanor for carrying a firearm without a license was not part of "the historically barred class" and could not be disarmed on that basis).

Likewise, respondent cannot establish that the historical tradition of firearm regulation permits an individual to be deprived of their right to possess a firearm based on their use of marijuana. *See, e.g.*, *United States v. Connelly*, __ F.4th __, 2024 WL 3963874, at *10 (5th Cir. Aug. 28, 2024) (limiting firearm possession "based on habitual or occasional drug use . . . imposes a far greater burden . . . than our history and tradition of firearms regulation can support"); *United States v. Harrison*, 654 F. Supp. 3d 1191, 1222 (W.D. Okla. 2023) (an individual's "status as a user of marijuana" is "not a constitutionally permissible means of disarming [them]").

In sum, because respondent has not attempted to meet its burden to show that Penal Law § 400.00(1)(c) and (e) are consistent with the historical tradition of firearm regulation and can be constitutionally applied to Mr. Casas, respondent's contention that the "proper cause" and "no good cause" requirements can be severed (and New York's firearm licensing regime can be otherwise constitutionally enforced) is not only unpreserved and procedurally barred under C.P.L. § 470.15(1), but also meritless.

CONCLUSION

For the foregoing reasons, and those set forth in the opening brief, the judgment should be reversed, and the indictment dismissed.

Dated: New York, New York
October 11, 2024

Respectfully Submitted,

Caprice R. Jenerson, Esq.
Attorney for Defendant-Appellant

By: Victorien Wu, Esq.
Supervising Attorney

OFFICE OF THE APPELLATE DEFENDER
11 Park Place, 16th Floor
New York, NY 10007
(212) 402-4100
vwu@oadnyc.org

ADDENDUM

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, - against - LAZARUS CASAS, Defendant-Appellant.	Ind. No. 71633/22

PRINTING SPECIFICATIONS STATEMENT

1. The following statement is made in accordance with Rule 1250.8(j) of the Practice Rules of the Appellate Division.

2. Lazarus Casas's reply brief was prepared on a computer in the processing system Microsoft Word 2016, with Century Schoolbook typeface, 14 point font (13 point font footnotes), and with lines double-spaced.

3. The text of the brief has a word count of 3,616 as calculated by the processing system.

Supreme Court of the State of New York
Appellate Division: First Department

The People of the State of New York, Respondent, — against — Lazarus Casas, Defendant-Appellant.	Affirmation of Service Ind. No. 71633/2022

Victorien Wu, an attorney duly admitted to practice in the State of New York, hereby affirms the following under penalties of perjury:

1. I am associated with the Office of the Appellate Defender, which has been assigned to represent the defendant-appellant in the above-captioned case.

2. On October 11, 2024, I served a Reply Brief on the attorney for the respondent, the People of the State of New York, at the Office of the District Attorney, New York County, Appeals Bureau, One Hogan Place, New York, New York 10013, by electronic mail at the address provided by that office: danyappeals@dany.nyc.gov. Respondent has consented to service by electronic mail on the date of filing.

3. In accordance with 22 NYCRR, Part 1250.11(d)(3), I will serve upon the defendant-appellant a copy of the reply brief filed in the above-captioned case by mail at the address designated by him.

Dated: New York, New York
October 11, 2024

Victorien Wu
Victorien Wu, Esq.

Appendix J

OAD | OFFICE OF THE APPELLATE DEFENDER

11 Park Place, Suite 1601, New York, NY 10007 | Tel. 212 402 4100 | Fax 212 402 4199
oadnyc.org fb.com/oadnyc @oad_nyc

December 18, 2024

Honorable Rowan D. Wilson
Chief Judge
Court of Appeals of the State of New York
20 Eagle Street
Albany, New York 12207

Re: *People v. Lazarus Casas*
Ind. No. 71633/2022 (New York County)
Application for Leave to Appeal

Your Honor:

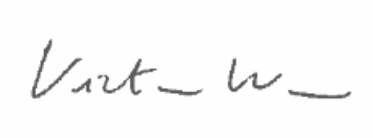
Lazarus Casas respectfully prays for the issuance of a certificate pursuant to Criminal Procedure Law § 460.20, granting permission to appeal and certifying that there is a question of law in the above-entitled case, which ought to be reviewed by the Court of Appeals. No application for leave to appeal has been made to any Justice of the Appellate Division.

Mr. Casas requests that an appeal be allowed to this Court from the order of the Supreme Court, Appellate Division, First Department, entered on November 26, 2024. Notice of entry was served by email on November 26, 2024. In its decision, the First Department affirmed the judgment of the Supreme Court, New York County, entered on November 7, 2022, convicting Mr. Casas, following a plea of guilty, of one count of criminal possession of a weapon in the second degree, Penal Law § 265.03(1)(b). Mr. Casas was sentenced to three and a half years of imprisonment and two and a half years of post-release supervision. Justice Robert Mandelbaum presided at omnibus motion, and Justice Neil Ross presided at plea and sentencing. There were no codefendants below.

A supplemental letter will be submitted to the Judge to whom this application is assigned, addressing in greater detail the reasons why the Court should review this case. A copy of the Appellate Division order is enclosed.

Respectfully submitted,

Caprice R. Jenerson, Esq.
Attorney for Defendant-Appellant

By: 
Victorien Wu, Esq.
Supervising Attorney

Encl.

cc: Office of the District Attorney
New York County
Appeals Bureau
Attn: Nathan Morgante, Esq.

OAD | OFFICE OF THE APPELLATE DEFENDER

11 Park Place, Suite 1601, New York, NY 10007 | Tel. 212 402 4100 | Fax 212 402 4199
oadnyc.org fb.com/oadnyc @oad_nyc

January 15, 2025

Hon. Madeline Singas
Associate Judge
Court of Appeals of the State of New York
20 Eagle Street
Albany, New York 12207

Re: *People v. Lazarus Casas*
Ind. No. 71633/2022 (New York County)
Application for Leave to Appeal (CLA-2024-01152)

Dear Judge Singas:

Leave should be granted to review the First Department's holding that, under the Second and Fourteenth Amendments to the Federal Constitution, an individual may be punished for the unlicensed possession of a firearm, even though, as defense counsel argued, and as the U.S. Supreme Court confirmed, the proper cause requirement in New York's firearm licensing regime was unconstitutional. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 11 (2022); *see also* U.S. Const. amend. II; *id.* amend. XIV, § 1. As the First Department's decision here reflects, this case is a proper vehicle through which to address the merits of this significant constitutional question. Unlike in *People v. Cabrera*, 41 N.Y.3d 35 (2023), the issue here is preserved because defense counsel filed a motion to dismiss the indictment based on Second Amendment grounds, contending that New York may not punish an individual for failing to comply with the unconstitutional licensing regime, including the proper cause provision. And unlike in *People v. Omar Johnson*, APL-2024-00111, there is no appeal waiver or issue of standing that encumbers this Court's consideration of the constitutional question. Because this case thus squarely and neatly presents the Second Amendment issue, and because New Yorkers deserve more than the one-sentence conclusory assertion provided by the First Department, leave should be granted.[1]

[1] By letter dated December 26, 2024, I was informed that Your Honor has been assigned to review Lazarus Casas's application for leave to appeal. This letter is intended to supplement Mr. Casas's initial leave application, dated December 18, 2024. Copies of the Appellate Division order and briefs have been separately forwarded to the Court. The cited record materials are enclosed.

Hon. Madeline Singas
January 15, 2025

Background

Mr. Casas Moves to Dismiss the Indictment on Second Amendment Grounds.

On April 13, 2022, after discharging a pistol into the air while he was on the rooftop of his apartment building at 201 W. 83rd Street in Manhattan, Mr. Casas was indicted on charges of criminal possession of a weapon in the second degree in violation of Penal Law § 265.03 (1)(b), criminal possession of a weapon in the second degree in violation of Penal Law § 265.03(3), and criminal possession of a firearm in violation of Penal Law § 265.01-b(1). *See* Indictment No. 71633/22; Felony Compl.

As part of the omnibus motion, Mr. Casas moved to dismiss the indictment on Second Amendment grounds. Omnibus Mot. at 9-10. In particular, Mr. Casas argued that the requirement that an individual applying for a license to carry a firearm outside the home must show that "proper cause exists for the issuance" of a license was onerous and violates the Second Amendment. *Id.* at 9 (quoting Penal Law § 400.00(2)(f) (2022)). Accordingly, Mr. Casas asserted that Penal Law §§ 265.01-b(1) and 265.03 are "unconstitutional because [they] impose[] criminal sanctions against those . . . who are alleged to have exercised their Constitutional right to bear arms without first obtaining a permit through [New York]'s onerous . . . licensing permit scheme." *Id.* at 10.

In response, the prosecution argued that the licensing scheme was not onerous, and the challenged provisions were not unconstitutional. Omnibus Resp. at 5-6.

On June 3, 2022, the court denied Mr. Casas's motion to dismiss the charges as unconstitutional under the Second Amendment. Omnibus Decision at 1. On September 21, 2022, without waiving his right to appeal, Mr. Casas pleaded guilty to one count of criminal possession of a weapon in the second degree, Penal Law § 265.03(1)(b). On November 7, 2022, Mr. Casas was sentenced to three and a half years of prison and two and a half years of post-release supervision.

Appellate Division Proceedings

On appeal, Mr. Casas again argued that the indictment should have been dismissed because, as defense counsel noted, the "proper cause" provision violated the Second Amendment, and thus, the enforcement of New York's firearm licensing regime against Mr. Casas was unconstitutional. *See* Appellant's Br.; Reply Br. The First Department rejected that argument without explanation. *People v. Casas*, 232 A.D.3d 555, 555 (1st Dep't 2024).

Hon. Madeline Singas
January 15, 2025

Leave Should Be Granted to Clarify Whether, Under the Second and Fourteenth Amendments to the Federal Constitution, an Individual May Be Punished for Failing to Comply With New York's Firearm Licensing Regime Even Though the Proper Cause Requirement Was Unconstitutional.

In *Cabera*, this Court recognized that it "will face an array of significant questions in [the] wake" of the U.S. Supreme Court's decision in *Bruen*. *Cabrera*, 41 N.Y.3d at 46. This case raises one of these questions, which *Cabrera* left open: whether, under the Second and Fourteenth Amendments to the U.S. Constitution, New York may punish an individual for the unlicensed possession of a firearm even though the proper cause provision in New York's firearm licensing regime was, in fact, unconstitutional.

As this Court has observed, New York does not criminalize all possessions of firearms; instead, New York law "prohibit[s] only *unlicensed* possessions of handguns." *People v. Hughes*, 22 N.Y.3d 44, 50 (2013). Indeed, Penal Law § 265.20(a)(3) provides that the statutes criminalizing weapon possession, including the ones at issue here, "shall not apply to . . . [p]osesssion of a pistol or revolver by a person to whom a license therefor has been issued as provided under section 400.00 . . . of this chapter." The criminal weapon possession statutes thus "work hand-in-glove" with the licensing regime under Penal Law § 400.00. *Wilson v. Hawaii*, __ U.S. __, 2024 WL 5036306, at *4 (U.S. Dec. 9, 2024) (statement of Gorsuch, J.).

At the time that Mr. Casas was charged, however, New York's licensing regime included the requirement that, to obtain a license to carry a firearm outside the home, an individual had to demonstrate "proper cause." *See* Penal Law 400.00(2)(f) (2022); *see also Bruen*, 597 U.S. at 12. As defense counsel argued, and as the U.S. Supreme Court confirmed, that provision was unconstitutional. *See* Omnibus Mot. at 9-10; *see Bruen*, 597 U.S. at 11. Accordingly, because the licensing regime was "not broad enough to accommodate the demands of the Second Amendment," *Wilson*, 2024 WL 5036306, at *4 (statement of Gorsuch, J.,), Mr. Casas could not be punished for his failure to comply with that regime. *See, e.g.*, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 148, 159 (1969) (reversing conviction for engaging in conduct without first obtaining license where applicable licensing regime violated the First Amendment); *Staub v. City of Baxley*, 355 U.S. 313, 314, 325 (1958) (same); *see also Smith v. Cahoon*, 283 U.S. 553, 556-57, 562-63, 567-68 (1931) (similar where applicable licensing regime violated due process and equal protection).

Although the First Department rejected this argument, it provided no explanation. *Casas*, 232 A.D.3d at 555. At the Appellate Division, respondent's only

answer was that the proper cause provision could be severed, and the rest of the licensing regime, could be enforced. Resp. Br. at 9-10, 12-16. According to respondent, Mr. Casas was ineligible for a license under Penal Law § 400.00(1)(c) and (e) because of a prior misdemeanor conviction and because of his use of marijuana. Resp. Br. at 9-10, 12-16. But, as Mr. Casas pointed out in his reply brief, the prosecution never made this argument in response to his motion to dismiss. Reply Br. at 13; *see also* Omnibus Resp. at 5-6. Accordingly, any decision by the First Department to reach this assertion was erroneous, for respondent's contention was both unpreserved and procedurally barred under C.P.L. § 470.15(1). *See People v. Hunter*, 17 N.Y.3d 725, 727-28 (2011) (holding that "the Appellate Division erred in entertaining" respondent's argument because the prosecution "did not assert" it in the trial court and thus "failed to preserve the issue"); *see also People v. LaFontaine*, 92 N.Y.2d 470, 474 (1998) (C.P.L. § 470.15(1) precludes review of issues "not ruled upon" by the trial court).

Moreover, insofar as the First Department accepted the merits of respondent's contention, that was also incorrect. As Mr. Casas observed in his reply brief, the burden is on the government to establish that historical tradition supports the regulation that it invokes. *See* Reply Br. at 13-14; *Bruen*, 597 U.S. at 24. Respondent, however, cited no authority to demonstrate that Penal Law § 400.00(1)(c) and (e) could be constitutionally applied to Mr. Casas. *See* Resp. Br. at 9-10, 12-16. Because respondent made no effort to meet its "burden to identify an American tradition justifying [these] requirement[s]," its argument necessarily fails. *Bruen*, 597 U.S. at 70.

As a result, the First Department erred when it concluded that Mr. Casas could be punished for failing to comply with New York's firearm licensing regime. *See Wilson*, 2024 WL 5036306, at *1, 3 (statement of Thomas, J., joined by Alito, J.) (noting that, because Hawaii's firearm licensing regime, which "closely paralleled" that of New York, was also unconstitutional, the Hawaii Supreme Court should have "upheld the dismissal" of the charges Mr. Wilson faced for carrying a firearm without a license); *id.* at *4 (statement of Gorsuch, J.) (expressing concern that the Hawaii Supreme Court "failed to grapple with" Mr. Wilson's argument that the unconstitutionality of Hawaii's licensing regime rendered the "charges against him . . . constitutionally problematic"). At a minimum, this case presents an important question of federal constitutional law that this Court should resolve.[2]

[2] In *Wilson*, Justice Thomas, Justice Alito, and Justice Gorsuch concurred in the denial of certiorari because the case was on an interlocutory posture, but the three Justices made clear that review from a final judgment in Mr. Wilson's case (or another case) would be appropriate. *See* 2024 WL 5036306, at *3 (statement of Thomas, J., joined by Alito, J.); *id.* at *5 (statement of Gorsuch, J.).

Hon. Madeline Singas
January 15, 2025

This case is an ideal vehicle through which to clarify Second Amendment law. Unlike in *Cabrera*, the constitutional claim here was duly preserved. C.P.L. § 470.05(2). Defense counsel moved to dismiss the indictment on Second Amendment grounds, specifically arguing that the proper cause requirement was unconstitutional, and New York therefore could not punish Mr. Casas for failing to comply with the firearm licensing regime. Omnibus Mot. at 9-10. In turn, the trial court denied that motion. Omnibus Decision at 1.

At the Appellate Division, respondent claimed that Mr. Casas's Second Amendment challenge was unpreserved because defense counsel did not renew the motion to dismiss after the Supreme Court decided *Bruen*, and thus, the trial court did not consider *Bruen* itself. Resp. Br. at 2-3, 6-8. But, as Mr. Casas noted, and as this Court's own precedent shows, a properly preserved constitutional issue does not somehow become unpreserved simply because the trial court did not have the opportunity to assess the latest U.S. Supreme Court decision. *See, e.g.*, *People v. Scott*, 70 N.Y.2d 420, 422-26 (1987) (defendant's Fourteenth Amendment claim remained preserved, and this Court applied *Batson v. Kentucky*, 476 U.S. 79 (1986), to resolve it, even though the trial court applied *Swain v. Alabama*, 380 U.S. 202 (1965), and its progeny); *see also People v. Hardy*, 4 N.Y.3d 192, 194-98 & n.3 (2005) (defendant's Sixth Amendment claim remained preserved, and this Court applied *Crawford v. Washington*, 541 U.S. 36 (2004), to resolve it, even though the trial court applied *Ohio v. Roberts*, 448 U.S. 56 (1980), and its progeny); *see also* Reply Br. at 5-6. Unsurprisingly, the First Department itself rejected respondent's argument on preservation. *See Casas*, 232 A.D.3d at 555.

In addition, unlike in *People v. Omar Johnson*, APL-2024-00111, there is no appeal waiver or issue of standing that would impede this Court's review of the constitutional question. At the Appellate Division, respondent attempted to raise the issue of standing for the first time, Resp. Br. at 8, but as the First Department correctly understood, that argument was improper as well. *See Casas*, 232 A.D.3d at 555. Indeed, in response to Mr. Casas's motion to dismiss, the prosecution never suggested that he lacked standing to assert a Second Amendment challenge, and the trial court made no such ruling. Omnibus Resp. at 5-6; Omnibus Decision at 1. Consequently, any argument by respondent about lack of standing is both unpreserved and procedurally barred under C.P.L. § 470.15(1). *See People v. Stith*, 69 N.Y.2d 313, 320 (1987) (rejecting respondent's argument on standing because it "was raised for the first time at the Appellate Division and thus is not preserved for our review"); *see also LaFontaine*, 92 N.Y.2d at 474.

In sum, this case is a proper vehicle through which this Court may clarify Second Amendment law. In particular, because this Court may well conclude in *People v. Omar Johnson*, APL-2024-00111, that the appeal waiver there precludes

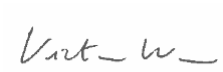
review of the Second Amendment challenge or that Mr. Johnson lacks standing to raise the constitutional issue, leave should be granted for this Court to directly address the merits of the Second Amendment claim here.

* * *

For the reasons discussed above, Mr. Casas respectfully prays for the issuance of a certificate, pursuant to C.P.L. § 460.20, granting permission to appeal and certifying that there is a question of law in his case which ought to be reviewed by this Court. Further, undersigned counsel respectfully requests the opportunity to present oral argument in person or by telephone conference in support of this application for leave to appeal.

Thank you for your consideration.

Respectfully submitted,



Victorien Wu, Esq.
Supervising Attorney
(212) 402-4146

Enclosure

cc: Office of the District Attorney
New York County
Appeals Bureau
Attn: Nathan Morgante, Esq.

OAD | OFFICE OF THE APPELLATE DEFENDER

11 Park Place, Suite 1601, New York, NY 10007 | Tel. 212 402 4100 | Fax 212 402 4199
oadnyc.org fb.com/oadnyc @oad_nyc

January 15, 2025

Solicitor General
Department of Law
The Capitol
Albany, NY 12224

Re: *People v. Lazarus Casas*
Ind. No. 71633/22 (New York County)
Application for Leave to Appeal (CLA-2024-01152)

To Whom It May Concern:

Enclosed is a copy of the application for leave to appeal and additional submission to the Court of Appeals of the State of New York on behalf of Lazarus Casas regarding his conviction under New York County Indictment No. 71633/22. As part of his argument, Mr. Casas is challenging the constitutionality of N.Y. Penal Law §§ 265.01-b and 265.03. *See* Additional Submission.

I write to provide the Attorney General with written notice of Mr. Casas's constitutional challenge, pursuant to N.Y. Exec. Law § 71 and N.Y. C.P.L.R. § 1012(b).

Sincerely,

Victorien Wu, Esq.
Supervising Attorney

Enclosure

cc: Heather Davis
Clerk of the Court
Court of Appeals of the State of New York
20 Eagle Street
Albany, NY 12207

Nathan Morgante
New York County District Attorney's Office
Appeals Bureau
One Hogan Place
New York, NY 10013

Appendix K

DISTRICT ATTORNEY
COUNTY OF NEW YORK
ONE HOGAN PLACE
New York, N. Y. 10013
(212) 335-9000

ALVIN L. BRAGG, JR.
DISTRICT ATTORNEY

January 30, 2025

Honorable Madeline Singas
Judge of the Court of Appeals
New York Court of Appeals
20 Eagle Street
Albany, New York 12207-1095

Re: *People v. Lazarus Casas*
N.Y. Co. Ind. No. 71633/2022

Dear Judge Singas:

I submit this letter in opposition to defendant's application for leave to appeal to the Court of Appeals. Defendant seeks to invalidate his weapon-possession conviction on the ground that, at the time he committed his gun-possession offense, New York's firearm-licensing statute included the "proper cause" requirement, which the Supreme Court subsequently struck down as inconsistent with the new "historical tradition" test that it adopted in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). Defendant's argument is unpreserved. Although *Bruen* was issued before he pled guilty, defendant did not alert the trial court to his theory that the historical tradition test required his weapon-possession charges to be dismissed. Defendant also lacks standing to challenge the licensing scheme because he has not demonstrated that he ever applied for a license. In any event, this case does not present any legal issue of continuing statewide importance. There is no question that the proper cause requirement was severable from the rest of the firearm-licensing scheme: the Legislature confirmed that when it removed the proper cause requirement but kept the rest of the licensing scheme intact. *See* L.2022, ch. 371 § 1. Leave should be denied.

On April 13, 2022, defendant went to the roof of his apartment building at 201 West 83rd Street, in Manhattan, and fired a .44 Magnum revolver into the air. The next

day, police searched defendant's apartment and recovered the gun. Defendant was then arrested.

Defendant was charged with two counts of Criminal Possession of a Weapon in the Second Degree (Penal Law §§ 265.03[1][b], [3]), and one count of Criminal Possession of a Firearm (Penal Law § 265.01-b[1]). Citing *District of Columbia v. Heller*, 554 U.S. 570 (2008), defendant moved to dismiss those charges, arguing that they were unconstitutional because New York's requirement that an applicant for a firearm license show "proper cause," former Penal Law § 400.00(2)(f), was "onerous" and practically amounted to a "total ban" on possessing firearms (Omnibus Motion ¶¶ 33-37). On June 3, 2022, citing *Libertarian Party of Erie County v. Cuomo*, 970 F.3d 106, 127-28 (2d Cir. 2020), the hearing judge denied defendant's motion and rejected his argument that the weapon-possession charges were unconstitutional (Decision & Order). On June 23, 2022, the Supreme Court issued its decision in *Bruen*, which promulgated the new "historical tradition" test and used it to strike down the proper cause requirement. Defendant did not seek to reargue his motion to dismiss in light of *Bruen*. On September 21, 2022, defendant pled guilty to second-degree criminal possession of a weapon, in full satisfaction of the indictment. On November 7, 2022, defendant was sentenced to three and a half years' imprisonment, to be followed by two and a half years of supervised release. He is currently incarcerated on this charge and has a conditional release date of October 2, 2025.

On appeal to the Appellate Division, First Department, defendant argued that his weapon-possession conviction was unconstitutional because the proper cause requirement violated the historical tradition test. On November 26, 2024, a unanimous panel of the Appellate Division affirmed the judgment, finding that defendant had not established that his prosecution and conviction violated the Second Amendment. *People v. Casas*, 232 A.D.3d 555, 555 (1st Dept. 2024).

To begin, defendant failed to preserve the specific claim on which he now relies. *See People v. Jackson*, 29 N.Y.3d 18, 22-23 (2017) (to preserve question of law for appellate review, counsel must lodge "specific" objection and "apprise the court of grounds upon which the objection is based") (quoting CPL § 470.05[2]); *see also, e.g.*, *People v. Blandford*, 37 N.Y.3d 1062, 1063, 1072-73 (2021) (general argument that police canine sniff violated the Fourth Amendment did not preserve specific argument that sniff required reasonable suspicion). At the trial level, defendant's only argument was that the proper cause requirement was "onerous" and thus analogous to the "total ban" on firearm possession that was struck down in *Heller* (Omnibus Motion ¶¶ 33-37). That argument did not alert the trial court that defendant wished it to conduct the "complex inquiry" that *Bruen* now requires: comparing modern regulations to their "historical analogues."

People v. Cabrera, 41 N.Y.3d 35, 50 (2023); *see also People v. Gates*, 31 N.Y.3d 1028, 1029 (2018) (appellate arguments unpreserved where constitutional claim was litigated below "within the framework of [] existing precedent"). Additionally, given that *Bruen*'s adoption of the historical tradition test constituted a "sea change" in the law, *People v. Garcia*, 41 N.Y.3d 62, 75-76 (2023) (Rivera J., dissenting), defendant's failure to invoke it below deprived the People of a fair opportunity to consider its implications and thus "ensure that [any] errors [were] avoided or corrected." *Cabrera*, 41 N.Y.3d at 42.

Defendant also lacks standing to raise his constitutional objection to New York's gun laws. When a defendant seeks to challenge a conviction under a firearm statute through a subsidiary attack on an underlying licensing regime, courts have repeatedly held that the defendant lacks standing if he never actually applied for a license. *See United States v. Decastro*, 682 F.3d 160, 164 (2d Cir. 2012). Without such an application and a subsequent denial of a license, the defendant cannot claim that he was injured by any unconstitutional provision in the licensing scheme, thus defeating an essential element of standing to raise his collateral constitutional attack. *See New York State Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 212 (2004); *see also Jackson-Bey v. Hanslmaier*, 115 F.3d 1091, 1096 (2d Cir. 1997) ("to establish standing to challenge an allegedly unconstitutional policy, a plaintiff must submit to the challenged policy").[1]

Here, defendant does not dispute that he never applied for a firearm license. Thus, he cannot show that his application would not have been either granted or else denied on grounds that *Bruen* did not disturb. Indeed, a licensing officer would not have needed to consider the proper cause requirement, because defendant's application could have been denied solely on account of his prior conviction for Criminal Possession of a Weapon in the Fourth Degree (Penal Law § 265.01[1]). *See* Penal Law §§ 400.00(1)(c), (1-b) (firearm license shall not be issued to an applicant with a prior conviction for a "serious offense" as defined in Section 265.00[17]); *see also Matter of Feerick v. McGuire*, 159 A.D.3d 1155, 1156 (3d Dep't 2018) (criminal possession of a weapon in the fourth degree qualifies as a "serious offense").[2] Moreover, if defendant had applied for a firearm license, a background check might well have revealed other ineligibilities that would have required the licensing officer to deny the application

[1] Defendant is wrong to rely on the statements of three Supreme Court Justices upon the denial of certiorari in *Wilson v. Hawaii*, --- U.S. ----, --- S.Ct. ----, 2024 WL 5036306 (Mem.) (U.S. Dec. 9, 2024). Statements from a minority of Justices regarding a denial of certiorari are not holdings.

[2] At the time of defendant's arrest, the relevant Penal Law provisions were contained in Sections 400.00(1)(c) and (1-a).

before he even considered the proper cause requirement. *See* Penal Law § 400.00(1) (firearm-license eligibility requirements).[3]

In any event, the constitutional deficiencies in the proper cause requirement provided no grounds for dismissing defendant's weapon-possession charges. Defendant's argument to the contrary rests on the assumption that *Bruen* invalidated the entire firearm-licensing scheme: "because the licensing regime was not broad enough to accommodate the demands of the Second Amendment . . . [defendant] could not be punished for his failure to comply with that regime" (Defendant's Supplemental Leave Application ["SLA"]: 3) (internal quotation omitted). But *Bruen* did not "abolish New York's licensing regime." *Garcia*, 41 N.Y.3d at 82 (Rivera, J., dissenting). Indeed, as this Court has recognized, "unconstitutional subdivisions" of a state statute "may be

---

[3] Contrary to defendant's argument (Supplemental Leave Application ["SLA"]: 5), the standing issue is not "procedurally barred" under *People v. LaFontaine*, 92 N.Y.2d 470 (1998). In denying defendant's motion to dismiss, the hearing court relied on Second Circuit caselaw finding that plaintiffs must apply for firearm licenses in order to have standing to challenge New York's proper cause requirement. Decision & Order at 1 (citing *Libertarian Party of Erie Cnty. v. Cuomo*, 970 F.3d 106, 127-28 [2d Cir. 2020] ["the Complaint does not allege that any law-abiding, responsible citizen who applied for a New York firearm license had been denied an at-home permit"]); *see People v. Nicholson*, 26 N.Y.3d 813, 825-26 (2016) (appellate court may "consider the import of the trial judge's stated reasoning" if it has a "reviewable predicate") (quoting *People v. Concepcion*, 17 N.Y.3d 192, 195 [2011]). In any event, as discussed in the People's Appellate Division Brief, p. 8 n.2, an appellate court may affirm based on lack of standing because standing to challenge the licensing regime was a component of defendant's motion to dismiss the weapon-possession charges. *See People v. Garrett*, 23 N.Y.3d 878, 885 n.2 (2014) (*Lafontaine* does not bar affirmance based on different prong of a "single multipronged legal ruling"); *People v. Smith*, 27 N.Y.3d 652, 669 n.3 (2016) (same). Defendant's citation to *People v. Stith*, 69 N.Y.2d 313, 315 (1987) (SLA: 5) is inapposite: that case concerned appellate arguments about a defendant's standing to contest a search at a suppression hearing, where the "the People bear the burden of showing the legality of the police conduct in the first instance." *People v. Lawson*, No. 123, 2024 N.Y. Slip Op. 06238, 2024 WL 5078420, at *2 (N.Y. Dec. 12, 2024) (citing *People v. Walls*, 37 N.Y.3d 987, 988 [2021]). By contrast, where a defendant seeks to challenge the constitutionality of the firearm-licensing scheme, the defendant bears the burden to establish standing by showing that he previously applied for a firearm license. *See, e.g.*, *Decastro*, 682 F.3d at 164; *People v. Vega*, 228 A.D.3d 467, 467 (1st Dept. 2024). It is entirely reasonable to put the burden on the People to establish a defendant's connection to a place that has been searched, but put the burden on the defendant to show that he previously applied for a firearm-license, given that a defendant who has applied for a firearm license can be reasonably expected to have much readier access to the pertinent evidence on that factual question.

severed from the valid [ones] and the remainder of the statute preserved"; severability turns on whether, if the Legislature had "foreseen" the "partial invalidity" of the statute in question, that body "would have wished the statute to be enforced with the valid part exscinded." *People v. Viviani*, 36 N.Y.3d 564, 583 (2021) (quotations omitted). Here, it is clear that the Legislature would not have jettisoned New York's entire licensing scheme if it had been forewarned that the proper cause requirement would be struck down. Soon after *Bruen* was decided, the Legislature revealed its intent by excising the proper cause requirement from the licensing scheme and letting the rest of the statute stand. *See* L.2022, ch. 371, § 1. This issue of law has thus been settled.[4]

Finally, even if the entire firearm-licensing scheme had been facially unconstitutional before the Legislature removed the proper cause requirement, defendant's case would still not present any broader questions about post-*Bruen* enforcement of the weapon-possession statutes, because his prior conviction for fourth-degree weapon possession rendered it impossible for him to show that such enforcement was unconstitutional as applied to him. *See United States v. Jackson*, 69 F.4th 495, 502 (8th Cir. 2023) (criminal defendant's Second Amendment challenge to federal weapon-possession statute failed where statute was constitutional as applied to him).[5]

In sum, this case presents no reviewable issue of law that requires this Court's consideration. Leave to appeal should be denied.

---

[4] Contrary to defendant's argument (SLA: 3-4), *Lafontaine* does not bar an appellate court from reviewing severability, which is clearly a component of defendant's claim that he cannot be punished for failing to comply with an unconstitutional "licensing regime" (SLA: 3). *See Garrett*, 23 N.Y.3d at 885 n.2; *Smith*, 27 N.Y.3d at 669 n.3. In any event, were this Court to find that it was procedurally barred from considering severability, this case would be a deeply flawed vehicle for exploring *Bruen*'s impact on criminal prosecutions for unlicensed firearm possession.

[5] Contrary to defendant's argument (SLA: 3-4), *Lafontaine* does not bar an appellate court from considering whether a defendant can mount an as-applied challenge to a statute, because an as-applied challenge is a necessary component of any claim that a statute is unconstitutional. *See Jackson*, 69 F.4th at 502; *see also Garrett*, 23 N.Y.3d at 885 n.2; *Smith*, 27 N.Y.3d at 669 n.3.

Respectfully submitted,

Nathan Morgante

Nathan Morgante
Assistant District Attorney
212-335-3819

cc: Victorien Wu, Esq.
The Office of the Appellate Defender
11 Park Place, Suite 1601
New York, New York 10007
vwu@oadnyc.org