

No. _____

**In the
Supreme Court of the
United States**

MATA BALOGH,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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September 23, 2026

QUESTION PRESENTED

Does the Second Amendment bar criminal prosecution for unlicensed-firearm possession where the defendant was subject to an unconstitutional firearms-licensing law and there were otherwise no lawful bases for disarming the defendant?

PARTIES TO THE PROCEEDING

The parties in this case are Petitioner Mata Balogh and Respondent the State of New York.

RELATED PROCEEDINGS

1. Supreme Court of the State of New York, Bronx County Criminal Term: *People of the State of New York v. Mata Balogh*, Bronx County Indictment No. 70327/23 (judgment entered June 21, 2023; entering judgment of conviction).
2. Appellate Division First Judicial Department of the Supreme Court of the State of New York, *People of the State of New York v. Mata Balogh*, 2023-03397 (judgment entered January 22, 2026; affirming the judgment).
3. Court of Appeals of the State of New York, *People of the State of New York v. Mata Balogh*, CLA-2026-00205 (order entered June 25, 2026; denying leave to appeal).

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
RELATED PROCEEDINGS.....	ii
OPINIONS BELOW	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
INTRODUCTION	3
STATEMENT OF THE CASE.....	6
A. Petitioner Is Prosecuted for Unlicensed-Firearm Possession	6
B. Petitioner Raises a Second Amendment Defense to the Charges.....	7
C. The Guilty Plea and Subsequent Appellate Litigation	7
REASONS FOR GRANTING THE PETITION	8
The question presented is of fundamental importance to the Second Amendment rights of the American People.	8
A. The question presented has divided our nation’s courts.	10
B. Contrary to the Appellate Division’s finding, Petitioner has a valid Second Amendment defense to the unlicensed-weapon-possession charges.....	13
C. The Second Amendment question presented is important to core liberty interests.	18
D. This case is an excellent vehicle for resolving the question presented.....	19
CONCLUSION.....	20

APPENDICES

Appendix A, New York Court of Appeals Order Denying Leave to Appeal	1a
Appendix B, Opinion of the New York Appellate Division, First Judicial Dept.	2a
Appendix C, Decision of the Bronx County Supreme Court Denying the Motion to Dismiss	6a
Appendix D, Motion Papers Filed in Bronx County Supreme Court Relating to Petitioner’s Motion to Dismiss	11a
Appendix E, Briefs Filed in the New York Appellate Division, First Judicial Dept.	63a

TABLE OF AUTHORITIES

CASES

<i>Bourdeau v. State</i> , 2023 WL 6567799 (Md. Ct. App. Oct. 10, 2023)	11
<i>City of Boerne v. Flores</i> , 521 U.S. 507 (1997).....	13
<i>City of Lakewood v. Plain Dealer Publishing Co.</i> , 486 U. S. 750 (1988).....	5
<i>In re Klenosky</i> , 428 App.Div.2d 793 (1980)	3
<i>Magnus v. United States</i> , 11 A.3d 237 (D.C. 2011).....	10
<i>Marbury v. Madison</i> , 5 U.S. 137 (1803)	9
<i>McDonald v. City of Chicago</i> , 561 U.S. 742 (2010).....	17
<i>Moore v. Harper</i> , 600 U.S. 1 (2023)	9, 13
<i>New York State Rifle & Pistol Assn. v. Bruen</i> , 597 U.S. 1 (2022)	passim
<i>People v. Johnson</i> , 2025 WL 3259873 (N.Y. Ct. App. Nov. 24, 2025)	8, 17
<i>People v. Miller</i> , 94 Cal.App.5th 935 (Cal. App. 2023)	12, 14
<i>People v. Mosqueda</i> , 97 Cal. App. 5th 399 (Cal. App. 2023)	12
<i>People v. Peguero</i> , 46 A.D.3d 668 (N.Y. App. Div. 2026)	5

<i>Plummer v. United States</i> , 983 A.2d 323 (D.C. 2009)	10
<i>Shuttlesworth v. City of Birmingham</i> , 394 U.S. 147 (1969)	13, 16, 17
<i>Smith v. Cahoon</i> , 283 U. S. 553 (1931)	5, 11, 13, 16
<i>State v. Ortiz</i> , 317 A.3d 737 (R.I. 2024)	11
<i>State v. Wade</i> , 301 A.3d 393 (N.J. App. Ct. 2023)	11
<i>State v. Wilson</i> , 543 P.3d 440 (Haw. 2024)	11
<i>Staub v. City of Baxley</i> , 355 U.S. 313 (1958)	11, 13, 16
<i>United States v. Miselis</i> , 972 F.3d 518 (4th Cir. 2020)	15
<i>United States v. Rahimi</i> , 602 U.S. 680 (2d Cir. 2024)	3
<i>Ward v. United States</i> , 318 A.3d 520 (D.C. Ct. App. 2024)	10, 15
<i>Wilson v. Hawaii</i> , 145 S.Ct. 18 (2024)	passim

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. II	1
U.S. Const. Amend. XIV	2

STATUTES

N.Y. Penal Law § 60.05	18
N.Y. Penal Law § 70.02	18
N.Y. Penal Law § 110.00	7
N.Y. Penal Law § 265.01	2, 3, 6
N.Y. Penal Law § 265.01-b	2, 6
N.Y. Penal Law § 265.02	2, 6, 18
N.Y. Penal Law § 265.03	2, 6, 7, 18
N.Y. Penal Law § 265.20	6, 9, 13, 14
N.Y. Penal Law § 400.00	2, 3
28 U.S.C. § 1257(a)	1
28 U.S.C. § 2403(b)	1

Other Authorities

Joshua Kleinfeld & Hadar Dancig-Rosenberg, <i>Social Trust in Criminal Justice: A Metric</i> , 98 Notre Dame L. Rev. 815 (2022).....	19
NEW YORK DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, Incarcerated Profile Report – February 2026, at Tbl. 3A (Feb. 1, 2026).....	18
Rachel E. Barkow, <i>Justice Abandoned</i> (Harv. Univ. Press 2025).....	14

PETITION FOR A WRIT OF CERTIORARI

Mata Balogh petitions for a writ of certiorari to review the judgment of the New York Appellate Division.

OPINIONS BELOW

The opinion of the Appellate Division, First Judicial Department is published at 245 A.D.3d 572. *See also* Pet. App. 2a-5a. Further review in the New York Court of Appeals was denied by an order published at 45 N.Y.3d 1014. The relevant order of the Bronx County Supreme Court is unpublished. *See* Pet. App. 6a-10a.

JURISDICTION

A Judge of the New York Court of Appeals denied leave to appeal the Appellate Division's order on June 25, 2026, rendering this petition timely filed on September 23, 2026. This Court has jurisdiction under 28 U.S.C. § 1257(a).

As this petition draws into question the constitutionality of state statutes, 28 U.S.C. § 2403(b) may be applicable and the Attorney General of the State of New York has been served with this petition. *See* Sup. Ct. Rule 29(4)(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES,
Amendment 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.

CONSTITUTION OF THE UNITED STATES,
Amendment XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NEW YORK PENAL LAW § 265.20(a)(3)

. . . Sections 265.01, 265.02, [and] 265.03 [of New York Penal Law] shall not apply to . . . Possession of a pistol or revolver by a person to whom a license therefore has been issued as provided under section 400.00 of this chapter . . .

NEW YORK PENAL LAW § 265.03(1)(b), (3)

A person is guilty of criminal possession of a weapon in the second degree when . . . (1) with intent to use the same unlawfully against each other, such person: (b) possesses a loaded firearm, 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 . . .

NEW YORK PENAL LAW § 265.02(3)

A person is guilty of criminal possession of a weapon in the third degree when . . . such person knowingly possesses a . . . firearm . . . which has been defaced for the purpose of concealment or prevention of the detection of a crime or misrepresenting the identity of such . . . firearm . . .

NEW YORK PENAL LAW § 265.01-b(1)

A person is guilty of criminal possession of a firearm when he or she . . . possesses any firearm . . .

NEW YORK PENAL LAW § 265.01(1)

A person is guilty of criminal possession of a weapon in the fourth degree when . . . He or she possesses any firearm . . .

FORMER NEW YORK PENAL LAW § 400.00(1), (2)(f)

A license for a pistol or revolver . . . shall be issued to . . . have and carry concealed, without regard to employment or place of possession, by any person when proper cause exists for the issuance thereof.

INTRODUCTION

In *New York State Rifle & Pistol Assn. v. Bruen*, 597 U.S. 1 (2022), this Court confirmed that the Second Amendment guarantees the right to keep and bear arms as a “means of self-defense” outside the home. *See United States v. Rahimi*, 602 U.S. 680, 690 (2d Cir. 2024) (citing *Bruen*, 597 U.S. at 17). The government’s curtailment of this “fundamental” right (*Rahimi*, 602 U.S. at 690) is presumptively unconstitutional unless the governmental regulation is consistent with a founding-era regulatory tradition. *Bruen*, 597 U.S. at 17, 37.

Bruen invalidated New York’s “proper cause” firearm-licensing standard (Former N.Y. Penal Law § 400.00(2)(f)), which required that New Yorkers demonstrate a “special need for self-protection distinguishable from that of the general community.” *Bruen*, 597 U.S. at 12-13 (quoting *In re Klenosky*, 428 App.Div.2d 793 (1980)). That “demanding” requirement “broadly prohibit[ed]” the core right and rendered it “virtually impossible” to bear arms. *Id.* at 12, 38; *id.* at 76 (Alito, J., concurring). The proper-cause requirement violated the Second Amendment because there was no founding-era tradition of prohibiting the right to

bear arms on the grounds that the applicant could not show a sufficient need to exercise that right. *Id.* at 37, 70.

Now that *Bruen* has rendered licensing standards vulnerable to constitutional attack, a critical constitutional question has repeatedly arisen in our nation’s criminal courts: when an individual is subject to an unconstitutional licensing standard and then prosecuted for unlicensed-weapon possession, under what circumstances does the Second Amendment furnish a defense to criminal prosecution.

In *Wilson v. Hawaii*, 145 S.Ct. 18 (2024), several Justices, in statements respecting the denial of certiorari, discussed the need to review the question presented in an appropriate case. There, the petitioner was prosecuted for unlicensed-firearm possession under a discretionary licensing regime that closely paralleled New York’s proper-cause standard. *Id.* at 21 (Thomas and Alito, JJ.). Although that case’s “interlocutory posture” rendered it a poor vehicle for deciding the question presented, *id.* at 18, Justices Thomas, Alito, and Gorsuch flagged the important question presented here.

Justice Gorsuch observed that, where penal statutes prohibit *unlicensed* weapon possession, the licensing laws and the unlicensed-possession criminal statutes “work hand-in-glove.” *Id.* at 22-23 (Gorsuch, J.). So, a constitutional defect in the licensing laws may taint the unlicensed-possession charge itself. *Id.*

Justice Thomas and Alito’s separate statement explained that “[a] defendant can always raise unconstitutionality as a defense ‘where a statute is invalid upon its face and an attempt is made to enforce its penalties in violation of constitutional

right.’ A ‘long line of precedent’ confirms this point.” *Id.* at 20 (quoting *Smith v. Cahoon*, 283 U. S. 553, 562 (1931) and *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U. S. 750, 755-57 (1988)). “In an appropriate case,” the Court “should make clear that Americans are always free to invoke the Second Amendment as a defense against unconstitutional firearms-licensing schemes.” *Id.* at 21-22.

This is that “appropriate case.” At the time of his felony arrest for unlicensed weapon possession in New York, Mr. Balogh was a “law abiding” American with no criminal record. *Bruen*, 597 U.S. at 8-10. He was not, consistent with the Second Amendment, subject to disarmament. The record establishes that Mr. Balogh carried a firearm for self-defense purposes, while the unconstitutional proper-cause standard was still in full effect. He argued that the Constitution barred the State from prosecuting him for violating an unconstitutional firearms-licensing standard. The New York courts refused to honor his Second Amendment defense, leaving him with a felony conviction.

This petition raises the question of whether, and under what circumstances, individuals prosecuted under unconstitutional firearms-licensing regimes can raise a Second Amendment defense to a criminal charge for unlicensed firearm possession. This Court should intervene to prevent state courts from continuing to convert a fundamental right into one that plays no role against the State’s most oppressive power: the power to convict and punish.¹

¹ The question presented here is the same question presented in the petition for certiorari pending before this Court in *Peguero v. New York* (awaiting a docket

STATEMENT OF THE CASE

A. Petitioner Is Prosecuted for Unlicensed-Firearm Possession

Petitioner was born in Mississippi and moved to New York City when he was 13 years old. Pet. App. 75a. He has his high school diploma, has been steadily employed as a superintendent since January 2022, has no criminal record (or even arrests), and no documented history of mental illness. *Id.* at 76a. Concerned about robberies in the Bronx, Mr. Balogh believed that carrying a gun when travelling through the Bronx would protect him from this kind of violence. *Id.* He would ultimately be arrested and charged with, among other lesser charges, second-degree criminal possession of a weapon, a C-violent felony carrying a mandatory prison term of 3.5 years and a maximum of 15 years. *See* N.Y. Penal Law § 265.03(1)(b), (3); Pet. App. 77a (the indictment also charged [1] third-degree criminal possession of a weapon under § 265.02(3); [2] criminal possession of a firearm under § 265.01-b(1); and [3] fourth-degree criminal possession of a weapon under § 265.01(1), (2)). A license is an absolute defense to all of the firearm-possession charges in the indictment. *See* N.Y. Penal Law § 265.20(a)(3). Upon his August 1, 2022 arrest, Mr. Balogh told the officers, “I’m just trying to protect myself.” *Id.* at 76a.

NYSRPA v. Bruen, 597 U.S. 1 (2022), which struck down New York’s proper-cause standard as unconstitutional, had been decided five weeks prior to his August 1, 2022 arrest. The New York statute repealing the proper-cause requirement did not go into effect until September 2022. N.Y. Session Laws, L. 2022, ch. 371, § 1, § 26.

number). *See People v. Peguero*, 46 A.D.3d 668 (N.Y. App. Div. 2026), *lv. to appeal denied*, 45 N.Y.3d 998 (2026).

B. Petitioner Raises a Second Amendment Defense to the Charges

Because there were no lawful bases for disarming him, Petitioner moved to dismiss the indictment under the Second Amendment and *Bruen*. Pet. App. 11a-31a. He pressed that he was a law-abiding citizen who had the constitutional right to carry a firearm in public for self-defense and that the “proper cause” requirement made it impossible to obtain a license to carry a firearm because he was unable to distinguish his interest in self-defense from that of the general community. *Id.* at 20a-25a.

The State opposed, stating that the *Bruen* decision “did not disturb any other aspect of New York’s gun licensing scheme” apart from the proper-cause requirement. *Id.* at 41a-55a. The State did not claim there were any lawful bases for denying Petitioner a license.

The trial court denied the motion to dismiss. Pet. App. 6a-10a. The court found that Petitioner lacked standing by not applying for a license, that *Bruen* did not “find the entire firearm licensing scheme, nor any of the Penal Law sections that criminalize firearm possession, unconstitutional,” and that Petitioner did not make a “‘substantial showing that submitting an application would have been futile’ as denial would have been based on the constitutionally defective provisions.” *Id.*

C. The Guilty Plea and Subsequent Appellate Litigation

Petitioner pled guilty on May 5, 2023 to attempted second-degree criminal possession of a weapon, a Class D “violent” felony (N.Y. Penal Law § 110-265.03(3)), in satisfaction of the indictment. He was sentenced to five years’ probation.

On appeal to the Appellate Division, Petitioner argued that the proper-cause standard tainted the indictment because there was no lawful basis to deny him a license. Pet. App. 80a-88a.

The Appellate Division rejected Petitioner’s argument that the conviction violated the Second Amendment. Pet. App. 3a. Petitioner had “standing to raise” his constitutional challenge to the proper-cause licensing statute “regardless of whether he sought to obtain a gun license.” *Id.* But he “failed to establish that the instant indictment is unconstitutional” under *Bruen*. *Id.* (citing *People v. Johnson*, 2025 WL 3259873, *3 (N.Y. Ct. App. Nov. 24, 2025) *cert. denied*, 2026 WL 1780086 (2026) (rejecting challenge to the New York licensing laws because *Bruen* did not invalidate the “entire” licensing scheme and the proper-cause provision was severable from the scheme’s remainder)).

After Petitioner renewed his Second Amendment claims before a Judge of the New York Court of Appeals, the Court denied leave to appeal. 45 N.Y.3d 1014. This timely petition follows.

REASONS FOR GRANTING THE PETITION

The question presented is of fundamental importance to the Second Amendment rights of the American People.

In *Bruen*, this Court held that New York’s “proper cause” licensing standard violated the Second Amendment. 597 U.S. 1. There is, *Bruen* held, no founding-era tradition of conditioning the fundamental right to bear arms on a government bureaucrat’s first finding a “special need” to exercise the right. *Id.*

Individuals, like Petitioner, whose charges were tainted by unconstitutional firearms-licensing statutes, are entitled to a remedy. *See, e.g., Marbury v. Madison*, 5 U.S. 137, 163 (1803) (“[Our government] has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”). After all, the government cannot lawfully prosecute and punish an individual for violating a “void” law “repugnant to the constitution.” *Moore v. Harper*, 600 U.S. 1, 19-20 (2023) (“an act of the legislature, repugnant to the constitution, is void”) (quoting *Marbury, supra*).

But in reviewing the hundreds of appeals challenging convictions under unconstitutional licensing standards, New York courts are—like numerous other courts throughout the nation—asking the wrong questions and therefore getting the wrong answers. The decision below reflects an unfortunate pattern of denying relief to anyone prosecuted for unlicensed-weapon possession under an unconstitutional regime while ignoring whether that unconstitutional regime tainted the individual’s access to a license and thus to a complete defense. *See* N.Y. Penal Law § 265.20(a)(3) (a firearms license confers absolute immunity from criminal-possession prosecution).

Here, as there were no lawful bases for denying Petitioner a license—indeed neither the State nor the lower courts even tried to identify one—this is the “appropriate case” to both confirm that “Americans are always free to invoke the Second Amendment as a defense against unconstitutional firearms-licensing schemes” and address the circumstances under which such a defense must prevail.

See Wilson, 145 S.Ct. at 21-22 (Thomas and Alito, JJ., statement respecting the denial of certiorari).

A. The question presented has divided our nation’s courts.

Only the District of Columbia Court of Appeals has permitted defendants to challenge criminal weapon-possession charges by demonstrating that they were subject to an unconstitutional-licensing standard and that there were no other lawful bases for disarmament. *See Ward v. United States*, 318 A.3d 520, 533-36 (D.C. Ct. App. 2024) (remanding for a hearing to determine “whether [Ward] may be ‘disqualified from the exercise of Second Amendment rights’”); *id.* at 533 n.12 (“Where the record does not resolve the question of whether an appellant was qualified to exercise Second Amendment rights, this court typically remands to the trial court for an evidentiary hearing to resolve the issue.”) (citing *Plummer v. United States*, 983 A.2d 323, 342 (D.C. 2009) and *Magnus v. United States*, 11 A.3d 237, 242-45 (D.C. 2011) (firearm possession cannot be penalized “unless the government proves the defendant was [otherwise] disqualified from exercising his Second Amendment rights”)). This theory is straightforward: if there are no lawful bases for depriving the defendant of a license, an unconstitutional licensing law taints a prosecution for *unlicensed* weapon possession since it deprives the accused of a defense. *See Wilson*, 145 S.Ct. at 22-23 (Gorsuch, J.) (a licensing statute works “hand in glove” with the unlicensed-possession-penal statute).

Numerous other state courts, by contrast, hold that defendants who did not seek and obtain a firearms-license decision lack “standing” to raise a Second

Amendment challenge of the licensing regime. *State v. Wade*, 301 A.3d 393, 403-04 (N.J. App. Ct. 2023) *lv. to appeal denied*, 255 N.J. 492 (2023); *State v. Wilson*, 543 P.3d 440, 444-45 (Haw. 2024), *cert. denied*, 145 S. Ct. 18 (2024); *Bourdeau v. State*, 2023 WL 6567799 at *5 (Md. Ct. App. Oct. 10, 2023), *cert. denied*, 486 Md. 351 (2024); *State v. Ortiz*, 317 A.3d 737, 741-45 (R.I. 2024). This camp posits that “law-abiding citizens are not free to ignore a statute and presume that they would have been granted a permit but for one potentially invalid provision of a permit statute.” *Wade*, 301 A.3d at 403.

The standing camp recognizes this Court’s decisions holding that individuals need not first seek a permit under an unconstitutional permitting scheme when seeking to exercise First Amendment rights. *See Wilson*, 145 S. Ct. at *20 (Thomas and Alito, JJ.) (“A defendant can always raise [a statute’s] unconstitutionality as a defense ‘where a statute is invalid upon its face and an attempt is made to enforce its penalties in violation of constitutional right.’”) (quoting *Smith*, 283 U.S. at 562; *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.”) (collecting cases). Nevertheless, this standing camp affords the Second Amendment less protection than the First Amendment, declining to “incorporate []” First Amendment protections “wholesale.” *Wade*, 301 A.3d at 404.

A third camp, which includes New York, has rejected Second Amendment defenses to unlicensed-possession charges by stressing that the defendant cannot show that the “entire licensing scheme” is unconstitutional since the offending provision is “severable” from the remainder of the licensing laws. *Johnson*, 2025 WL 3259873, *3; *see, e.g., People v. Mosqueda*, 97 Cal. App. 5th 399, 403 (Cal. App. 2023); Pet. App. 3a. As the California courts have explained, “[defendants] have argued, unsuccessfully, that *Bruen* rendered California’s entire licensing scheme facially unconstitutional, and as a result, it was unconstitutional to punish nonfelons such as them for carrying a firearm in public solely because they did not have a license.” *Mosqueda*, 97 Cal. App. 5th at 403 (citing, *e.g., People v. Miller*, 94 Cal.App.5th 935 (Cal. App. 2023)). Although such defendants have “standing to raise the [Second Amendment] defense,” it fails on the merits because “*Bruen* did not render California’s entire licensing scheme or the charges against them unconstitutional. The offending ‘good cause’ requirement is severable from the remainder of the licensing statute[.]” *Mosqueda*, 97 Cal. App. 5th at 403; *see also Miller*, 94 Cal.App.5th at 945 (“Critically, while *Bruen* raises constitutional concerns regarding the licensing requirements set forth [in California law], it does not suggest [California’s] concealed carry prohibitions . . . are unconstitutional. *Bruen* addressed only the constitutionality of New York’s licensing regime—not its impact on any potential criminal charges for carrying a firearm without a license.”).

B. Contrary to the Appellate Division’s finding, Petitioner has a valid Second Amendment defense to the unlicensed-weapon-possession charges.

A “defendant can always raise [a statute’s] unconstitutionality as a defense ‘where a statute is invalid upon its face and an attempt is made to enforce its penalties in violation of constitutional right.’” *Wilson*, 145 S. Ct. at 20 (Thomas and Alito, JJ.) (quoting *Smith*, 283 U.S. at 562); *see Staub*, 355 U.S. at 319. As this Court has held in the First Amendment context, this Court’s “decisions have made clear that a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license.” *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969).

This rule makes good sense. It is unconstitutional to prosecute someone for failing to comply with a “void” law. *Harper*, 600 U.S. at 19-20. “[C]onstitutional rights are ‘self-executing prohibitions on governmental action.’ A constitutional violation accrues the moment the government undertakes an unconstitutional act” and that principle applies “to the Second Amendment[,] which is similarly self-executing.” *Wilson*, 145 S.Ct. at 20 (Thomas and Alito, JJ.) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997)). A “State transgresses” the Second Amendment “as soon as the State implements a licensing regime that is inconsistent with the Nation’s ‘historical tradition of firearm regulation.’” *Id.* at 20-21.

Further, New York’s firearms-licensing statutes, like almost all firearms-licensing statutes, work “hand in glove” with the criminal-unlicensed-possession statutes. *Wilson*, 145 S. Ct. at 22 (Gorsuch, J.); *see* N.Y. Penal Law § 265.20(a)(3)). If

the licensing statute imposes an unconstitutional standard (e.g., “proper cause”), that unconstitutional standard taints the criminal-unlicensed-possession charge too because it interferes with the defendant’s access to the absolute defense that a license confers. N.Y. Penal Law § 265.20(a)(3). New York’s former proper-cause regime is thus indistinguishable from one declaring that it is a felony to: (a) possess a loaded firearm (b) without first establishing “proper cause” to carry. Just as the Constitution would bar a conviction under that statute, it similarly bars a conviction under the licensing scheme at issue here.

So, while it is true that *Bruen* was a civil case that addressed the “constitutionality of New York’s licensing regime” and “not its impact on any potential criminal charges for” unlicensed carry (*Miller*, 94 Cal.App.5th at 945), it is also irrelevant. *Bruen* confirmed that licensing requirements lacking sufficient historical pedigree violate the Second Amendment. The necessary result of that decision is that Americans cannot be prosecuted for failing to satisfy unconstitutional, and thus void, licensing laws. Anything less produces the unprecedented result that a fundamental constitutional right has no role to play as a defense to a criminal charge. That result would violate this Court’s precedents and ignore the basic reality that the “framers were obsessed with curbing government overreach in *criminal* matters.” Rachel E. Barkow, *Justice Abandoned*, 50 (Harv. Univ. Press 2025) (emphasis added).

To be sure, not all defendants charged with unlicensed weapon-possession can secure relief because licensing standards are unconstitutional. As the D.C. Court of Appeals has held, a defendant is not harmed by unconstitutional licensing

requirements—and may be lawfully prosecuted—if the licensing statute contains other *constitutional* bases for denying the defendant a license. *Ward*, 318 A.3d at 533-36; *see also United States v. Miselis*, 972 F.3d 518, 547 (4th Cir. 2020) (conviction upheld because record “establishes conclusively that the defendants’ [] conduct falls under the statute’s surviving purposes”). A 14-year-old defendant charged with unlicensed weapon possession, for example, would not be aggrieved by an unconstitutional proper-cause standard since that defendant’s age provided a lawful basis for prosecution independent of the unconstitutional proper-cause requirement. Under such circumstances, the unconstitutional-licensing standard does not taint the unlicensed-possession charge.

Here though, the unconstitutional proper-cause standard tainted the indictment because there were no other lawful bases for denying Petitioner a license. In response to Petitioner’s motion to dismiss, the State did not claim that Petitioner was in any way disqualified from public carry. Nor could it. Petitioner was a “law abiding” American citizen who was over the age of 21 and had no prior convictions. Indeed, the Appellate Division offered no explanation for denying relief beyond that Petitioner “failed to establish that the instant indictment is unconstitutional” under *Bruen*. Pet. App. 3a. Additionally, Petitioner’s conduct was plainly protected by the Second Amendment. It was uncontested that he possessed a firearm for self-protection purposes.

The severability theory adopted by the Appellate Division below—through its citation to *Johnson*, which ran with that theory—is also illogical. To be sure, a

severability analysis is necessary if the defendant is actually subject to lawful disarmament under other constitutional licensing provisions. For instance, if a defendant could also be disarmed under a constitutional order-of-protection provision, the proper-cause provision's unconstitutionality would not furnish a defense *unless* it is unseverable from the order-of-protection provision. Under those circumstances, the accused must, to prevail, show that the unconstitutional provision is a “poison pill” that dooms other lawful and applicable licensing restrictions.

But here, as there are no constitutional bases for disarmament, the proper-cause provision tainted the indictment even though it is severable from the licensing statute's remainder. *One* unconstitutional licensing provision is more than enough to taint a possession charge where, as here, there are no other lawful provisions justifying disarmament.

As for standing, the New York courts correctly found that Petitioner had standing to challenge the licensing laws even though he did not first apply to obtain a firearm license (Pet. App. 3a). A contrary finding would plainly violate this Court's precedents. *See, e.g., Staub*, 355 U.S. at 319 (holding, in a free-speech case, that “[t]he 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.”); *Shuttlesworth*, 394 U.S. at 151; *Smith*, 283 U.S. at 562. This Court, in First Amendment cases, has rejected the requirement that a defendant complete the licensing-application process in order to retain standing to later raise the licensing

statute’s unconstitutionality as a defense. The Second Amendment is entitled to the same protections against “standing” rules as the First. *See Johnson*, 2025 WL 3259873, *3 (rejecting a First and Second Amendment distinction in this standing context because “the Supreme Court [has] made clear in *Bruen* that the Second Amendment is not a ‘second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.’”) (quoting *Bruen*, 597 U.S. at 70)).

The government can no more punish someone for failing to satisfy an unconstitutional firearms-licensing standard than it can punish unlicensed assembly under a permit law requiring a showing that the assembly will “likely spread wisdom.” *Shuttlesworth*, 394 U.S. at 159. Nor could a state punish unlicensed marriage if its marriage-licensing standard unconstitutionally required that the couple show that “their love is likely to advance the general welfare.” And yet, when it comes to the Second Amendment, courts, such as the New Jersey appellate courts, are diluting the right to bear arms with a novel standing obstacle, reducing that right “to the status of a “a second class right.” *Bruen*, 597 U.S. at 70 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010)).

Unconstitutionally “mandat[ing] that would-be gun owners go through an unconstitutional licensing process” (*Wilson*, 145 S.Ct. at 21) (Thomas and Alito, JJ.), causes grave harm too. Such a regime forces Americans to sacrifice their right to bear arms—and thus the fundamental right to self-defense—while they trudge through an unconstitutional licensing system and wait for a licensing decision. The standing

camp, operating under the premise that the Second Amendment right is a disfavored right, ignores that reality.

C. The Second Amendment question presented is important to core liberty interests.

The question presented is constantly recurring in the thousands of unlicensed-possession prosecutions that the states are pursuing every year. A clear answer to the question presented will provide much-needed guidance.

Courts' indiscriminate rejection of Second Amendment defenses carries significant ramifications. In New York, unlicensed public carry is a Class C, violent felony. N.Y. Penal Law § 265.03. An individual with no prior criminal record faces a mandatory term of incarceration between 3.5 and 15 years for merely failing to obtain a license. N.Y. Penal Law §§ 60.05(4), 70.02(3)(b). And prosecuting unlicensed possession has become a cottage industry in New York. According to the most recently published data from the New York Department of Corrections and Community Supervisions, over 4,800 individuals are currently in prison for weapons offenses. NEW YORK DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, Incarcerated Profile Report – February 2026, at Tbl. 3A (Feb. 1, 2026). Until this Court holds that the Second Amendment can furnish a defense to unlicensed-possession prosecutions, the State, having lost the power to deny licenses under unconstitutional requirements, *Bruen*, 597 U.S. 1, will paradoxically maintain the power to prosecute individuals for failing to satisfy those very requirements.

D. This case is an excellent vehicle for resolving the question presented.

The facts and procedural posture of this case make it an excellent vehicle to determine whether, or under what circumstances, individuals can be prosecuted for failing to comply with a licensing scheme that contains a facially unconstitutional licensing standard, such as “proper cause.”

The question is squarely and cleanly presented. Petitioner raised his Second Amendment claim at every stage of the litigation. And the state courts rejected it on the merits. The Appellate Division did not find, because the record does not support, that there were any lawful bases to disarm Petitioner. Thus, as this case comes to this Court, the unconstitutional proper-cause standard tainted the unlicensed-weapon-possession indictment.

This case also demonstrates the harsh consequences of reducing the Second Amendment to a second-class right. Petitioner, a law-abiding citizen who had no criminal record and no other viable basis for license denial, is now saddled with a felony conviction because he could not secure a license under an unconstitutional licensing regime. That result is hard to square with the Second Amendment, this Court’s decisions, or common sense. Americans have little reason to put their faith in the Second Amendment if the Amendment has no role when the State wields the “most oppressive tool in its arsenal—the criminal instrument.” Joshua Kleinfeld & Hadar Dancig-Rosenberg, *Social Trust in Criminal Justice: A Metric*, 98 Notre Dame L. Rev. 815, 869 (2022).

This Court should intervene to clarify that the Second Amendment can provide a defense to unlicensed-weapon-possession charges.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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RINA DEFRANCESCO
CENTER FOR APPELLATE LITIGATION

APPENDIX

State of New York Court of Appeals

BEFORE: HON. ROWAN D. WILSON, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

MATA BALOGH,

Appellant.

**ORDER
DENYING
LEAVE**

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:

JUN 25 2026



Chief Judge

*Description of Order: Order of the Appellate Division, First Department, entered January 22, 2026, modifying a judgment of the Supreme Court, Bronx County, rendered June 21, 2023, and as so modified, affirming the judgment.

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

Manzanet-Daniels, J.P., Webber, Friedman, González, Michael, JJ.

5634	THE PEOPLE OF THE STATE OF NEW YORK, Respondent,	Ind. No. 70327/23 Case No. 2023-03397
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-against-

MATA BALOGH,
Defendant-Appellant.

Jenay Nurse Guilford, Center for Appellate Litigation, New York (Rina V. DeFrancesco of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Christopher P. Marinelli of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Guy H. Mitchel, J. on motion to dismiss; Albert Lorenzo, J. at plea and sentencing), rendered June 21, 2023, convicting defendant, of attempted criminal possession of a weapon in the second degree, and sentencing him to five years of probation, unanimously modified, on the law, to the extent of striking the conditions of probation requiring him to submit to any drug and/or alcohol testing if directed by the Department of Probation, to participate in alcohol and other treatment programs if directed by the Department of Probation, to follow certain conditions regarding housing and non-residential programs if under the age of 21 years, to observe conditions in any order of protection, to perform services for a public institution, to follow certain conditions if convicted of a sex offense, to comply with any sex offender registration requirements, to refrain “from wearing or displaying gang paraphernalia” or “having any association with a gang or members of a gang if

directed by the Department of Probation,” and to pay a surcharge and fees, and otherwise affirmed.

Defendant validly waived his right to appeal (*see People v Thomas*, 34 NY3d 545, [2019], *cert denied* 589 US --, 140 SCt 2634 [2020]), which forecloses review of his excessive sentence claim (*see People v Nunez*, 220 AD3d 597, 597 [1st Dept 2023], *lv denied* 41 NY3d 1004 [2024]). As an alternative holding, we perceive no basis for reducing the sentence.

Defendant's valid waiver does not foreclose review of his Second Amendment claim, and he has standing to raise his challenge to the constitutionality of New York's firearm licensing scheme, notwithstanding that he never applied to obtain a firearm license (*see People v Johnson*, -- NY3d --, 2025 NY Slip Op 06528, *2 [2025]). However, defendant has failed to establish that the instant indictment is unconstitutional under *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]) (*see Johnson*, 2025 NY Slip Op 06528 at *3).

Defendant's challenge to 11 conditions of his probation as not reasonably related to his rehabilitation survive his valid appeal waiver and does not require preservation (*see People v Alvarez*, 233 AD3d 619, 620 [1st Dept 2024], *lv denied* 43 NY3d 961 [2025]; *People v Arias*, 210 AD3d 593, 594 [1st Dept 2022], *lv denied* 39 NY3d 1109 [2023]; *see also People v Hakes*, 32 NY3d 624, 628 n 3 [2018]). The condition of defendant's probation (Condition No. 7) requiring that he “[a]void injurious or vicious habits; refrain from frequenting unlawful or disreputable places; and . . . not consort with disreputable people” (Penal Law §§ 65.10[2][a], [b]) was providently imposed as reasonably related to ensuring that defendant “will lead a law-abiding life or to assist him to do so” (Penal Law § 65.10[1]) given that defendant was found in possession of a

loaded firearm (*People v Lowndes*, 239 AD3d 574, 575 [1st Dept 2025], *lv denied* NY3d , 2025 NY Slip Op 98120[U] [2025]). The same is true of the condition requiring that he “[s]upport dependents and meet other family responsibilities” (Condition No. 14; *see* Penal Law § 65.10[2][f]).

However, nine conditions were “not reasonably related to defendant's rehabilitation, or necessary to ensure that he will lead a law-abiding life” (*People v Vasquetelles*, 241 AD3d 1208, 1209 [1st Dept 2025]; *see also Alvarez*, 233 AD3d at 620; Penal Law § 65.10[1]). There is no evidence that defendant had a history of gang affiliation or that his offense was connected to gang activity, and as such the condition related to a prohibition on gang affiliation (Condition No. 24) must be stricken (*see Vasquetelles*, 241 AD3d at 1209).

Considering defendant’s denial of drug and alcohol use, the Department of Probation’s assessment of defendant for substance abuse with no recommendation for further treatment, and the lack of any evidence defendant’s offense involved drug or alcohol use, conditions related to drug and alcohol testing and treatment (Condition Nos. 15 and 13) must also be stricken (*see People v Rivera*, 239 AD3d 521, 522-23 [1st Dept 2025]; *Arias*, 210 AD3d at 594).

The condition of defendant’s probation requiring that he pay the mandatory surcharge and other fees (Condition No. 10) is not reasonably related to defendant’s rehabilitation, or necessary to ensure that he will lead a law-abiding life, and must be stricken (*see People v Wood*, 239 AD3d 484, 484-485 [1st Dept 2025]). We note that the People do not oppose this relief.

The remaining conditions that must be stricken (Condition Nos. 17-21) are not applicable to defendant or reasonably related to his rehabilitation (*People v Elvin*, 242 AD3d 670 [1st Dept 2025]; *Alvarez*, 233 AD3d at 620).

Defendant's constitutional challenge to Condition Number 7 under the First, Fifth, and Fourteenth Amendments claim is unpreserved, and we decline to review it in the interest of justice (see *People v Cabrera*, 41 NY3d 35, 42-51 [2023]; *Lowndes*, 239 AD3d at 575).

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

ENTERED: January 22, 2026

A handwritten signature in black ink, reading "Susanna Molina Rojas". The signature is fluid and cursive, with the first name "Susanna" and last name "Rojas" clearly distinguishable.

Susanna Molina Rojas
Clerk of the Court

Appendix C

FILED

MAY 02 2023

SUPREME COURT CLERK'S OFFICE
BRONX COUNTY

SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY: PART 11

-----X
THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION AND ORDER

IND. # 70327-2023

MATA BALOGH,

Defendant.

-----X
MITCHELL, GUY H., J:

The defendant is charged with committing the crime of Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03[3]) and other related charges. The defendant submits the instant motion seeking various forms of pre-trial relief.

The Court has reviewed the Indictment, Defendant's Notice of Motion, People's Affirmation in Opposition, Grand Jury Minutes, and Exhibits on file with the Court. The defendant's omnibus motion for pre-trial relief is decided as follows:

Second Amendment

The defendant submits the instant motion seeking dismissal of his indictment pursuant to the Second Amendment and the United States Supreme Court decision in *New York State Rifle & Pistol Assn., Inc. v Bruen*, 142 S Ct 2111 [2022]. The defendant's motion is **denied**.

The defendant asserts that the Supreme Court has held that the entirety of New York's firearm licensing regulations is unconstitutional. The defendant also specifically challenges the constitutionality of the weapon possession crimes for which he has been indicted. The defendant

further claims that under the Second Amendment, he was not required to apply for a license to possess a firearm.

The People oppose the motion, stating that the *Bruen* decision “did not disturb any other aspect of New York’s gun licensing scheme” (People’s opposition at 21) apart from the “proper cause” requirement and insisting the defendant has no standing because he did not allege that he applied for a firearms license (*id.* at 21-22).

In *New York State Rifle & Pistol Assn., Inc. v Bruen*, 142 S Ct 2111 [2022], the Supreme Court struck down a portion of New York’s firearm licensing scheme that requires an applicant to show “proper cause exists” to obtain an unrestricted license to “have and carry” a concealed pistol or revolver outside one’s home or place of business (*Bruen*, 142 S Ct at 2122; *see also* Penal Law § 400.00[2][f]). The Court held that “New York’s proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms” (*id.* at 2156). Specifically, the Court found too “demanding” the requirement that to carry a firearm outside one’s home or place of business, the applicant must “demonstrate a special need for self-protection distinguishable from that of the general community” which “generally require(s) evidence of particular threats, attacks or other extraordinary danger to personal safety” (*id.* at 2122-2123) (internal citations omitted). The *Bruen* Court found that New York, as well as six other states and the District of Columbia, provide too much discretion to licensing officials and unconstitutionally hamper “the right of law-abiding, responsible citizens to use arms for self-defense” (*id.* at 2131).

This Court finds the defendant misreads the holding in *Bruen* which did not find the entire firearm licensing scheme, nor any of the Penal Law sections that criminalize firearm

possession, unconstitutional. The long-standing and constitutionally permissible prohibitions discussed in *Bruen* remain within New York State's licensing laws (*see e.g.* Penal Law § 400.00[1][c]-[e])¹; (*see also Seila Law LLC v Consumer Financial Protection Bureau*, 140 SCt 2183, 2209 [2020] (“Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact....” [internal quotation marks and citation omitted])).

Further, the *Bruen* decision does not preclude the prosecution for unlawful possession of a firearm of a defendant who did not previously apply for, and was denied, a license. The new regulations passed by the Legislature, effective starting September 2, 2022, eliminate the “proper cause” provision struck in *Bruen* and add additional requirements designed to preserve public safety (*see* L 2022, ch 371). These regulations do not cast doubt on the validity of Penal Law § 400.00 nor do they suggest that the Legislature intended the unfettered possession of firearms as the defendant suggests.

The applicants in *Bruen*, unlike the defendant here, challenged the denial of their unrestricted carry licenses through proper legal procedures, and not by violating any Penal Law provisions. In the case at hand, the defendant lacks standing because he has not shown that he had submitted to the challenged policy by applying for a license in the first instance (*see U.S. v Decastro*, 682 F3d 160, 164 [2d Cir 2012]). Nor has defendant made a “substantial showing that submitting an application would have been futile” as denial would have been based on the

¹ The Court left standing that part of the licensing statute related to possessing a firearm in the home or place of business (NY PL § 400.00[2][a]) or at a place of business (NY PL § 400.00[2][b]). The Court also left in place other procedural safeguards such as background checks, criminal history and fingerprinting (NY PL § 400.00[3][4]).

constitutionally defective provisions (*id.*) (internal citations omitted). Moreover, the defendant has not shown that he could have overcome the constitutionally permissible restrictions in the licensing provisions left standing by the Court in *Bruen*.

The motion to dismiss based upon the Second Amendment is therefore *denied*.

Grand Jury Proceedings

The defendant's motion to inspect the Grand Jury minutes is *granted* to the extent that the Court has conducted an *in camera* inspection of the transcript.

The defendant's motion to dismiss and reduce the charges in the indictment is *denied*. Based upon an *in camera* review of the grand jury transcript, the court finds that (1) the presentation was legally sufficient; (2) the Grand Jury was adequately instructed on the law and (3) there were no defects in the proceedings. Quorum of the Grand Jury was present during both the presentation of evidence and instruction on the law to the Grand Jury.

The defendant's request for release of the grand jury minutes pursuant to CPL § 210.30 is *denied*. The evidence submitted to the grand jury was straightforward and presents no novel or complicated legal issues.

Hearings

The defendant moves to suppress physical evidence. In the alternative, the defendant requests a *Mapp/Dunaway* hearing. The People oppose a *Mapp/Dunaway* hearing. The defendant's motion is *granted*, to the extent that **a pre-trial *Mapp/Dunaway* hearing is ordered** (*see Mapp v Ohio*, 367 US 643 [1961]; *Dunaway v New York*, 442 US 200 [1979]).

The defendant moves to suppress all properly noticed statements or, in the alternative, the defendant requests a *Huntley/Dunaway* hearing. The People consent to a *Huntley* hearing on the issue of voluntariness but oppose a *Dunaway* hearing. The defendant's motion to suppress statements is *granted*, to the extent that **a pre-trial *Huntley/Dunaway* hearing is ordered** as to all properly noticed statements (*see People v Huntley*, 15 NY2d 72 [1965]; *Dunaway v New York*, 442 US 200 [1979]).

Pursuant to CPL § 240.43, immediately prior to the commencement of jury selection, the People are directed to notify the defendant of all specific instances of any prior uncharged criminal, vicious or immoral conduct of which the prosecutor has knowledge and intends to use at trial for purposes of impeaching the credibility of the defendant. A *Sandoval/Ventimiglia* hearing is **ordered** to take place before the trial court (*People v Sandoval*, 34 NY2d 371 [1974]; *People v Ventimiglia*, 52 NY2d 350 [1981]).

Remaining Requests for Relief and Reminders

The People are reminded of their ongoing obligation to provide the defendant with any and all exculpatory material in accordance to *Brady v Maryland*, 373 US 83 (1963) and its progeny.

The People are directed to determine if 911, radio transmissions and other recordings exist and are further directed to exercise due care to preserve any such materials (*People v Rosario*, 9 NY2d 286 [1961]).

Leave is **granted** as to any motions which the defendant could not have raised in the instant motion. Accordingly, the procedural and substantive merits of any motions submitted beyond the statutorily prescribed time limits will be addressed upon submission and reply.

This constitutes the decision and order of the Court.

Dated: April 14, 2023

Bronx, NY



Guy H. Mitchell
Acting Justice of the Supreme Court

HON. GUY H. MITCHELL

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, CRIMINAL TERM PART T11

THE PEOPLE OF THE STATE OF NEW YORK

OMNIBUS MOTION

-against-

Ind. No. 70327/2023

MATA BALOGH,

Defendant.

PLEASE TAKE NOTICE, that upon the annexed affirmation of Samantha Tucker, Esq., and upon the prior proceedings in this case, the undersigned will move this Supreme Court, Criminal Term, Part T11, on the 14th day of April 2023, at 9:30 a.m. or as soon thereafter as counsel may be heard for an Order granting the following relief:

1. **Dismissal of the Indictment pursuant to C.P.L. § 30.30(1)(a);** or in the alternative, granting the following:
2. Suppressing any and all statement taken from Mr. Mata Balogh for which the prosecution served proper notice under C.P.L. § 710.30 or, in the alternative, granting a hearing for findings of fact and conclusions of law (Huntley/Dunaway);
3. Suppressing any and all physical evidence seized from Mr. Mata Balogh or areas alleged to be in his control, in the alternative, granting a hearing for findings of fact and conclusions of law (Mapp/Dunaway);
4. **Inspection of the Grand Jury Minutes** and release of said minutes to defense counsel, and Dismissal of the Indictment.

5. Dismissal of the Indictment pursuant to **the Second Amendment of the United States Constitution.**
6. Precluding the prosecution from introducing at trial any evidence of Mr. Balogh's convictions or bad acts (Sandoval/Ventimiglia).
7. Reserving the right to file supplemental motions once discovery is produced.
8. Granting such additional relief as the Court deems just and proper.

DATED:
BRONX, NEW YORK
March 7, 2023

/s/ Samantha Tucker
SAMANTHA TUCKER, Esq.
THE BRONX DEFENDERS
360 East 161st Street
Bronx, New York 10451
(646) 780-9863
stucker@bronxdefenders.org

TO:

Darcel D. Clark District Attorney Bronx County
Attn: ADA Rachel Taverna
Via EDDS and electronic mail

Clerk of the Court
Supreme Court, Bronx County
Via EDDS

Attorney General Letitia James
Office of the Attorney General, 28 Liberty Street,
New York, New York 10005
Via First Class Mail

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, CRIMINAL TERM PART T11

THE PEOPLE OF THE STATE OF NEW YORK

AFFIRMATION

-against-

Ind. No. 70327/2023

MATA BALOGH,

Defendant.

SAMANTHA TUCKER, an attorney duly admitted to practice law in the State of New York,
affirms under penalty of perjury that:

1. I am associated with the Bronx Defenders and am attorney of record for Mr. Balogh. I am familiar with the facts of his case and the prior proceedings held in it.
2. This affirmation is made in support of Mr. Balogh's Omnibus Motion.
3. Unless otherwise indicated, all allegations of fact are based upon inspection of the record in this case, initial investigations of the facts and circumstances surrounding the incidents, and discussions with the assigned assistant district attorneys, and are based on information and belief.

FACTUAL AND PROCEDURAL HISTORY

4. On August 1, 2022, at approximately 10:19 p.m., Mr. Mata Balogh (*hereinafter* "Mr. Balogh") was exiting 2359 Valentine Avenue in Bronx County, New York. As Mr. Balogh approached his scooter, NYPD Officer Sanchez-Ramirez and Officer Jimenez jumped out of an unmarked vehicle and immediately approached and searched Mr. Balogh without pause or reasoning. Mr. Balogh responded by putting his hands in the air. From the

moment Officer Sanchez-Ramirez exited the vehicle to the moment Officer Sanchez-Ramirez illegally searched Mr. Balogh, only seven seconds had passed. The police allege to have recovered a 9mm Polymer firearm from Mr. Balogh's left-side pant pocket.

5. Officer Sanchez-Ramirez and their partner unlawfully and forcibly approached, seized and searched Mr. Balogh without an articulable reason or requisite level of suspicion. Mr. Balogh was merely attempting to leave the location, getting on his scooter. Mr. Balogh did not make any furtive or suspicious movements; in fact, he did the opposite: he faced the officers and put his hands in the air as the officers lunged towards him from an unmarked car. Mr. Balogh was wearing baggy grey sweatpants; it defies logic that the officers would affirmatively spot the "outline" or "bulge" of a firearm while traveling in a moving vehicle of someone who was standing on a sidewalk, during the evening, with vehicles, trees and other objects between the Officers view and Mr. Balogh. There are no allegations of contraband in plain view, and the officers did not observe Mr. Balogh committing any crime. Mr. Balogh did not have any outstanding warrants that could have justified his arrest, nor any search incident to that arrest. No substantive conversation between the Officers and Mr. Balogh occurred to give rise to any level of suspicion. No exigent circumstances existed. No consent, court order, or any other form of lawful authorization existed for Officer Sanchez-Ramirez or any other officers' actions toward Mr. Balogh.

6. Subsequent to his unlawful arrest, while at the precinct, Mr. Balogh was extensively questioned by NYPD officers and made statements to the officers in response to questioning.

7. Further, while in police custody, a DNA sample was taken from Mr. Balogh in the form of a cup by the NYPD officers without a warrant, without Mr. Balogh's knowing and voluntary consent, and without the advice and presence of an attorney.

8. The prosecution does not allege that Mr. Balogh used the firearm or that he intended to use the firearm unlawfully against another person. This fact is integral to the motion to dismiss pursuant to the Second Amendment protections. Mr. Balogh has no criminal record in the state of New York and is indigent, and thus could not pay for the licensing fees related to owning a firearm.

9. Moreover, at the time of Mr. Balogh's charged conduct, P.L. § 265.03(3) made it a class C violent felony to possess a loaded firearm outside of a person's home or place of business unless such person had a license to carry a firearm pursuant to P.L. § 400.00. In order to obtain a license to carry a firearm, a licensing officer had to find "proper cause" to issue such license, and even then, the officer had discretion to deny the license. An individual's generalized interest in self-defense could not establish "proper cause."

10. However, in *New York State Rifle & Pistol Assn v. Bruen*, decision issued on June 23, 2022, the United States Supreme Court struck down the licensing scheme as violating the Second Amendment of the United States Constitution. Slip Op. No. 20-843 (June 23, 2022). In the instant matter, Mr. Balogh is charged under P.L. § 265.03(3) for no other reason than he allegedly possessed a firearm without a license to carry such firearm under an unconstitutional scheme.

11. On August 2, 2022, Mr. Balogh was arraigned in Bronx Criminal Court on a criminal court complaint, docket CR-013533-22BX. Mr. Balogh was put on Supervised Release. The case was adjourned to August 5, 2022 for Grand Jury Action.

12. On August 5, 2022, there was no Grand Jury Action. There was no Grand Jury Action on the following court dates:

- a. August 18, 2022
- b. August 31, 2022
- c. September 15, 2022
- d. September 29, 2022
- e. October 18, 2022
- f. November 9, 2022
- g. December 1, 2022
- h. December 22, 2022
- i. January 9, 2023

13. On January 26, 2023, in GWP1, the prosecution stated that a true bill had been voted on January 25, 2023, and requested February 15, 2023 for Supreme Court Arraignment. No Certificate of Compliance or Statement of Readiness was filed on January 26, 2023.

14. A true bill was filed by the prosecution in January of 2023. The indictment charges Mr. Balogh with Criminal Possession of a Weapon in the Second Degree, P.L. § 265.03(3), and other related charges.

15. On February 15, 2023, Mr. Balogh was arraigned on the indictment. A motion schedule was set by the Honorable Judge Mitchell. The case was adjourned to April 14, 2023 for Decision.

16. For the reasons outlined in the Memorandum of Law in Support, Defense now moves this Court to (1) inspect and dismiss the indictment on multiple grounds and (2) suppress evidence or alternatively grant fact-finding hearings.

/s/ Samantha Tucker

SAMANTHA TUCKER, Esq.
THE BRONX DEFENDERS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, CRIMINAL TERM PART 11

THE PEOPLE OF THE STATE OF NEW YORK

MEMORANDUM OF LAW

-against-

Ind. No. 70327/2023

MATA BALOGH,

Defendant.

MOTION TO DISMISS PURSUANT TO § 30.30(1)(A)

Mr. Balogh respectfully moves this Court to dismiss Ind. No. 70327/2023 pursuant to C.P.L. § 30.30(1)(a) as the prosecution has exceeded their statutory time limit.

On August 2, 2023, Mr. Balogh was arraigned on a felony complaint. A motion schedule was set on February 15, 2023, after Mr. Balogh was in arraigned in Supreme Court. There is no excludable time between August 2, 2022, and February 15, 2023.

Under C.P.L. § 30.30(1)(a), the prosecution must be ready for trial within six months of the commencement of the criminal action in which a felony is charged. In order to announce ready for trial, the prosecution must not only secure an indictment but they must file a Certificate of Compliance and Statement of Readiness pursuant to C.P.L. §§ 245.20 and 245.50. Readiness under C.P.L. 30.30 means “both a communication of readiness by the People on the record and an indication of present readiness.” *People v. Kendzia*, 64 N.Y.2d 331, 337 (NY 1985). Further, C.P.L. § 245.20 requires that the Certificate of Compliance and Statement of Readiness filed by the prosecution “shall be served upon the defendant and file with court.”

Upon review of the Court file, the prosecution has not served a Statement of Readiness or Certificate of Compliance on the Court.¹ In the instant case, the prosecution has exceeded their C.P.L. § 30.30(1)(a) time given the time period between August 2, 2022, and February 15, 2023, is six months and thirteen days and thus the indictment must be dismissed pursuant to C.P.L. § 30.30(1)(a).

MOTION TO DISMISS THE INDICTMENT

Should the Court not dismiss pursuant to C.P.L. § 30.30(1)(a), Mr. Balogh respectfully moves this Court to inspect the Grand Jury minutes and determine whether dismissal of the indictment is warranted because the evidence before the grand jury was legally insufficient to support the charges in the indictment. C.P.L. § 190.65(1). Upon a finding that evidence before the was not legally sufficient to establish a commission of the offenses charged, or any lesser included offenses, Mr. Balogh requests a dismissal of this indictment, or the appropriate counts thereof, or a reduction of the charges contained in the indictment. C.P.L. § 210.30.

In additional, Mr. Balogh respectfully requests this Court to examine the Grand Jury minutes and to determine whether dismissal of the indictment is warranted on any of the following grounds:

¹ Defense counsel acknowledges receiving a COC and Statement of Readiness from the prosecution on January 30, 2023. However, no proof of service was attached. Upon inspection of the Court file, a COC or Statement of Readiness has not been filed with the Court.

1. The general legal instructions given to the Grand Jury by the prosecutor, as well as ones relating specifically to this case, were misleading or improper. *See, e.g., People v. Carraciola*, 78 N.Y.2d 1021 (1991).
2. The rules of evidence were not followed in the presentation of evidence before the Grand Jury. C.P.L. § 190.30(1).
3. The proceeding was conducted before fewer than sixteen Grand Jurors, or fewer than twelve Grand Jurors who had heard all the essential testimony concurred in the finding of the indictment. C.P.L. § 210.35(2)(3).
4. Not every witness testified before the Grand Jury was sworn and under oath. *See, e.g., People v. Vasquez*, 119 Misc.2d 896 (Sup. Ct. N.Y. Co. 1983).
5. Unauthorized persons were present in the Grand Jury room. C.P.L. § 190.25(3).
6. Any other ground that impaired the integrity of the Grand Jury proceeding, including not limited to, the prosecutor's failure to exercise a duty of fair dealing to the accused and to the service of justice. *See* C.P.L. § 210.35(5); *People v. Huston*, 88 N.Y.2d 400 (1996).

If the Court determines the presence of any of these defects in the Grand Jury proceeding outlined, Mr. Balogh moves this Court, pursuant to C.P.L. §§ 210.20 and 210.35, to dismiss the indictment.

MOTION TO DISMISS FIREARM CHARGES PURSUANT TO THE SECOND
AMENDMENT

Mr. Balogh respectfully requests that this Court dismiss with prejudice the indictment pursuant to C.P.L. §§ 210.20(1)(a), 210.25, and the incorporated Second Amendment. As referenced above, C.P.L. § 210.20(1)(a) allows the accused to move to dismiss an indictment

when “such indictment or count is defective within the meaning of C.P.L. § 210.20(1)(a) when the charged statute is unconstitutional. C.P.L. § 210.25(3). The Supreme Court of the United States has held that the incorporated Second Amendment protects the rights of individuals to possess and carry firearm and ammunition. As such, these counts must be dismissed as violations of this right.

Specifically, the Second Amendment to the United States provides: “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. II. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment guarantees an “individual right to possess and carry weapons in case of confrontation.” *Id.* at 592. This right of “the people” to keep and bear arms for self-defense belongs to “all members of the political community, not an unspecified subset.” *Id.* at 580; *See also id.* at 581 (announcing a “strong presumption” that the Second Amendment right “belongs to all Americans.”). “[I]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.” *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010).

In order to lawfully carry a firearm in public in New York, the government requires citizens to first obtain a license. To grant a license to an applicant, among other criteria, the licensing officer must find that “proper cause exists.” P.L. § 400.00(2)(f). “Proper cause” has been defined in case law as “a special need for self-protection distinguishable from that of the general community.” *See, In re Klenosky*, 75 A.D.2d 793 (1st Dept. 1980). New York law criminalizes possession of a firearm without first obtaining this license. P.L. § 265.03(3); *See also, People v. Hughes*, 22 N.Y.3d 44, 50 (2013) (“New York’s criminal weapon possession

laws prohibit only *unlicensed* possession of handguns”). Recently, in *New York State Rifle & Pistol Assn v. Bruen*, the United States Supreme Court struck down New York’s public carry licensing system, holding that it unconstitutionally interferes with citizens’ Second Amendment rights. Slip Op. No. 20-843 (June 23, 2022). The Court stated that “New York’s proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms.” *Id.* at 63. The Court explicitly took issue with the discretionary nature of New York’s licensing scheme, contrasting it to systems in other states that “contain only ‘narrow, objective, and definite standards’ guiding licensing officials, rather than requiring the ‘appraisal of facts, the exercise of judgment, and the formation of an opinion’ as New York’s system does. *Id.* at 30, n. 9 (internal citations omitted).

In this case, Mr. Balogh is facing criminal charges solely on the basis that he did not obtain a license to carry a firearm. Because the licensing system is unconstitutional, this Court must dismiss the indictment. Moreover, the Constitution does not require Mr. Balogh to first attempt to obtain a license under the facially unconstitutional licensing scheme, only to be denied. *Smith v. Cahoon*, 283 U.S. 553, 562 (1931); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1939). The Court addressed this issue in analogous circumstances in *Staub v. City of Baxley*, 355 U.S. 313 (1958). In that case, the appellant was convicted of violating a city ordinance that prohibited solicitation of membership for an organization without a permit. *Id.* at 314. The appellant did not apply for the appropriate license prior to soliciting membership from the employees of another company, in direct contravention of the ordinance. *Id.* at 315. However, the ordinance granted the mayor and council of the city “unfettered discretion” in their decision to grant or refuse the required permit, “without semblance of definitive standards or other

controlling guides.” *Id.* at 322. The Court struck down the licensing scheme as invalid on its face, as it made enjoyment of First Amendment freedoms “contingent upon the will of the Mayor and Council of the City, although that fundamental right is made free from congressional abridgement by the First Amendment[.]” *Id.* At 325. In reaching its decision to reverse the appellant’s conviction, the Court explained that “[t]he 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.” *Id.* at 319. “The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands.” *Id.*

The Court in *Bruen* held that the rights bestowed by the Second Amendment should be treated no differently than rights protected by any other amendment, including the First Amendment. “The constitutional right to bear arms in public for self-defense is not ‘a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.” *Bruen*, No. 20-843 at 62. Therefore, the reasoning in *Staub* applies equally in this case. Just as the appellant in *Staub* could engage in the exercise of their right of free expression despite having made no attempt to secure a permit under the facially invalid statute, so too Mr. Balogh was permitted to freely exercise his right to carry a firearm in the face of an unconstitutional licensing law without first attempting to secure a license.

The D.C. Court of Appeals has specifically addressed the issue of a defendant’s failure to seek a license in the context of a firearm possession. In *Heller*, the Supreme Court held that the Second Amendment guarantees “an individual right to possess and carry weapons in case of confrontation,” invalidating Washington, D.C.’s near total ban on handgun possession. 554 U.S.

at 592. In the wake of *Heller*, the D.C. Court of Appeals held that defendants could move to dismiss indictments charging them with firearms possession under the unconstitutional statute, even where they never applied for licenses for the firearms under the statute. *See, Plummer v. United States*, 983 A.2d 323, 341-42 (D.C. 2009) (citing *Chicago v. Atchinson, Topeka & Santa Fe Ry. Co.*, 357 U.S. 77, 89 (1958)). This was so even where the defendant had pled guilty to unlawful possession prior to the decision in *Heller*. *Magnus v. United States*, 11 A.3d 237 (D.C. 2011).

More specifically, the court in *Magnus* held that, “unless the government proves the defendant was disqualified from exercising his Second Amendment rights,” it is “impermissible under the Second Amendment to convict a defendant” for unlicensed possession of a firearm if an unconstitutional licensing scheme made it “impossible” for the defendant to obtain a license. *Id.* At 242-43. Here, the “proper cause” requirement made it “impossible” for Mr. Balogh to obtain a license to carry a firearm because he could not distinguish his interest in self-defense from that of the general community. New York courts have made clear that, to obtain a license to carry a firearm, the applicant must provide evidence “of personal threats, attacks or other extraordinary danger to personal safety.” *Bruen*, No. 20-843 at 3 (citing *In re Martinek*, 294 A.D.2d 221, 222 (2022)). The New York licensing law is “almost engineered” to preclude “most citizens” from exercising a fundamental, enumerated constitutional right.” *See, Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017) (addressing Washington D.C.’s nearly identical “good cause” requirement for gun licenses).

Mr. Balogh is also charged under sections P.L. §§ 265.01-b(1) and 265.01(1). These charges are lesser included offenses of P.L. § 265.03(3) and the only basis for the charge is that Mr. Balogh did not have a license to carry a firearm. Mr. Balogh is facing these charges only

because he did not obtain a license under an unconstitutional scheme. They must therefore be dismissed as well.

Because the Supreme Court has found New York's gun licensing scheme to be unconstitutional, and because the prosecution cannot show that Mr. Balogh was "disqualified from exercising his Second Amendment rights," this Court must dismiss the indictment related to the firearm charges. *See Magnus*, 11 A.3d 237 at 242-43.

MOTION TO SUPPRESS PHYSICAL EVIDENCE

Mr. Balogh moves, pursuant to C.P.L. § 710.20(1), to suppress all physical evidence seized from his person or from an area under his dominion or control. This physical evidence includes: 9mm Polymer firearm, the DNA sample seized on August 1, 2022, as well as any observations of Mr. Balogh made by police, on the grounds that such evidence was seized and such observations were made unlawfully in violation of Mr. Balogh's constitutional rights derived from the United States Constitution, Fourth and Fourteenth Amendments, New York State Constitution, Article I, Section 12, *Mapp v. Ohio*, 367 U.S. 643 (1961), and *Dunaway v. New York*, 442 U.S. 200 (1979).

On information and belief, from the sources identified in paragraph III of Mr. Balogh's Affirmation above, Officer Sanchez-Ramirez recovered a loaded 9mm Polymer from Mr. Balogh's pocket. Further, the NYPD took a DNA sample from Mr. Balogh on August 1, 2022, while Mr. Balogh was in the custody of the NYPD. The police stop of Mr. Balogh was illegal. *People v. De Bour*, 40 N.Y.2d 210 (1976). Police intrusion on a person's life must have proper justification. *Id.* Any alleged property seized as a result of an unjustified intrusion must be suppressed. *People v. Henry*, 185 A.D.2d 1 (1st Dept. 1992). When the police intrude on a

person's life by arresting that person, the police must have probable cause to believe that the person has committed, is committing, or is about to commit a felony or misdemeanor. C.P.L. § 140.50(1); *see also*,; *Terry v. Ohio*, 392 U.S. 1 (1968); *People v. De Bour*, 40 N.Y.2d at 223. Furthermore, it is clear that law cannot validate a precipitate search by what it produces. *People v. Scott D.*, 34 N.Y.2d 483, 490 (1974).

When the police seized and searched Mr. Balogh, he was not engaged in or suspected of any illegal activity, nor was there any bulge or weapon visible in plain-view. This is especially true from the vantage point of a person within a moving vehicle. Mr. Balogh was exiting a building; there is not an assertion or an iota of evidence that his movements or actions prior to police contact were suspicious or furtive. There was no consent, court order, warrant or any other lawful authorization in existence for Officer Sanchez-Ramirez or any other officers' actions towards Mr. Balogh. No exigent circumstance existed. Thus, no reasonable suspicion or other articulable explanation justified the approach and immediate intrusive and precipitate search and seizure of Mr. Balogh's body.

The search and seizure of Mr. Balogh constitutes a clear violation of his rights under the New York State Constitution, Article I, Section 12, and under the Fourth Amendment of the Federal Constitution, and the alleged physical evidence recovered by the police must be suppressed. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Wong Sun v. United States*, 371 U.S. 471 (1963). The police allegation of a firearm recovered from Mr. Balogh's sweatpants is sufficient to establish standing to suppress the recovered items. *See, People v. Burton*, 6 N.Y.3d 584, 588 (2006) ("a defendant is entitled to rely on the Prosecution's proof to demonstrate standing").

Accordingly the subsequent DNA evidence seized from Mr. Balogh and any information created from it is a tainted fruit of the unlawful arrest and must be suppressed. *People v.*

Rodriguez, 175 Misc. 2d 217, 311 (Sup. Ct. Kings Co. 2003) (recognizing an “exclusive property right” in person genetic information). In addition, the DNA sample was obtained after Mr. Balogh was in custody and without a warrant or Mr. Balogh’s valid and knowing consent. Therefore, the officers’ actions were unconstitutional and the DNA information must be suppressed.

Even if this Court finds that Mr. Balogh had abandoned the cup in this case, the DNA information extracted from the DNA molecules on the cup must be suppressed under the U.S. and N.Y. Constitutions because Mr. Balogh maintained an expectation of privacy in his DNA information. Specifically, Mr. Balogh is moving to suppress the information extracted from the DNA—the reports, analysis, and inferences obtained from the analysis of the physical molecule. The distinction obtaining the DNA (from a bottle, cigarette, or elsehow) to its analysis or extraction as two separate searches is rooted in Supreme Court precedent. In *Skinner v. Ry Labor Executives’ Assn*, the Court clarified this distinction: “[o]btaining and examining the evidence may also be a search...if doing so infringes an expectation of privacy that society is prepared to recognize as reasonable.” 489 U.S. 602, 616 (1989). Lower appellate federal courts have applied this principle and held that DNA analysis was indeed a search. *See, e.g., United States v. Davis*, 690 F.3d 226, 246 (4th Cir. 2012); *United States v. Mitchell*, 652 F.3d 387, 407 (3d Cir. 2011). Thus, Mr. Balogh challenges the analysis of the DNA and the information it yielded as a search requiring a warrant, separate from the physical appropriate of the DNA itself.

Under *Carpenter v. United States*, 138 S. Ct. 2206 (2018), an individual maintains an expectation of privacy in their information if the information (1) is of “deeply revealing nature,” (2) of substantial “depth, breadth, and comprehensive reach,” and (3) can easily be collected, even if the information is disclosed to a third-party. *Id.* At 2223. (holding that defendant had an expectation of privacy in his cell-site location data finding police’s

collection of this data without a warrant unconstitutional). *See also, Riley v. California*, 573 U.S. 373 (2014) (warrant required to search contents of cell phone legally in police custody); *United States v. Jones*, 565 U.S. 400 (2012) (warrantless GPS-monitoring vehicle's movement on public roads violated defendant's expectation of privacy).

DNA information contains “deeply revealing” information about all aspects of an individual, and this it is a substantial “depth, breadth, and comprehensive reach.” As such, society at large, and courts more specifically, have recognized the strong privacy interest an individual holds in their DNA information. *See e.g., Birchfield v. North Dakota*, 136 S. Ct. 2160, 2177 (2016) (DNA yields a “wealth of [] highly personal information”); *United States v. Davis*, 690 F.3d 226, 246 (4th Cir. 2012) (“the extraction of DNA and the creation of a DNA profile result in a sufficiently separate invasion of privacy that such acts must be considered a separate search under the Fourth Amendment even when there is no issue concerning the collection of the DNA sample.”); *United States v. Mitchell*, 652 F.3d 387, 407 (3d Cir. 2011) (“[t]he second ‘search’ at issue is, of course, the processing of the DNA sample and creation of the DNA profile for CODIS. This search also has the potential to infringe upon privacy interests.”).

DNA information is “easily collected,” by collecting DNA molecules with a swab, and then extracting that DNA and analyzing it using standard laboratory procedures and equipment. Importantly, in *Carpenter*, the defendant did not waive his expectation of privacy even though the cell-site information was in the control of a third party. Cell-site data, the Court explained, is “not truly ‘shared’ as one normally understands the term.” *Carpenter*, 138 S. Ct. at 2220. First, because this information is generated and logged by the very operation of a cell phone, and does not require any “affirmative act on the part of the user.” *Id.* Second, because cell phones are “such a pervasive and insistent part of daily life” that carrying one is indispensable to

participation in modern society,” it is impossible to avoid “leaving behind a trail” of information. *Id.*

This analysis is immediately applicable to DNA, because, just like cell-site data, DNA is left behind all the time and everywhere, a fundamental part of human biology. DNA exists in all humans and in each and every cell of every human. Scientific research has shown conclusively that humans leave—by touching, through spit, or simply shedding—cells, and thus DNA, all around them all the time. Such shedding of DNA is the most “pervasive and insistent part of daily life,” if anything is. *Id.* The leaving-behind of DNA occurs without control, is completely non-voluntary, and remains, to most individuals, unknown. Indeed, it is impossible for humans to avoid leaving a trail of DNA wherever they go.

In this case, Mr. Balogh had an expectation of privacy in his DNA information. Mr. Balogh did not consent to his DNA information being collected or analyzed. There was no exigent circumstances. The DNA information was obtained without a warrant or court order. Therefore, the officers’ actions were unconstitutional and the DNA must be suppressed.

If the Court denies suppression on the motion, Mr. Balogh moves for a *Mapp/Dunaway* hearing to make findings of fact and conclusion of law pursuant to C.P.L. § 710.60(4). Mr. Balogh further requests that any property seized which is in the possession of the Police Department be produced on the date of the hearing.

MOTION TO SUPPRESS STATEMENTS

At Mr. Balogh’s arraignment on August 2, 2022, the prosecution served notice under C.P.L. § 710.30(1)(a) of its intent to introduced a statement allegedly made by Mr. Balogh, subsequent to his unlawful arrest, while at the precinct. Mr. Balogh made statements to officers in response to questioning. Mr. Balogh moves to suppress the statement for which this

notice was served under C.P.L. §§ 60.45, 710.20(3) and 710.40(1), and contends it was illegally obtained on the following grounds:

1. It is the tainted fruit of an unlawful arrest. *See, Dunaway v. New York*, 442 U.S. 200 (1979) (Mr. Balogh incorporates herein the Affirmation, *supra*, and argument concerning the unlawful stop in the *Mapp/Dunaway* section of this memorandum of law).
2. It was made after Mr. Balogh was subject to custodial interrogation without first being advised of his *Miranda* rights. C.P.L. § 60.45(2)(b)(ii).
3. Mr. Balogh made the statement without knowingly and intelligently waiving his right to remain silent.
4. Mr. Balogh involuntarily made the statement. C.P.L. § 60.45(2)
5. This statement was secured in violation of Mr. Balogh's right to Counsel.

If denied suppression on this motion, Mr. Balogh moves for a *Huntley/Dunaway* hearing to make findings of fact and conclusions of law pursuant to C.P.L. § 710.60(4). Mr. Balogh is not required to make specific factual allegation concerning circumstances under which the statements were made. C.P.L. § 710.60(3)(b).

PRIOR CONVICTIONS AND BAD ACTS

Mr. Balogh may wish to testify on his own behalf. He requests the prosecution notify him of all instances of his prior uncharged bad acts which the prosecution intend to use at trial. *See* C.P.L. § 240.43. Moreover, the prosecution should be precluded from entering into evidence, on its direct case or upon cross-examination, any of Mr. Balogh's prior arrests, convictions or bad acts, as the prejudicial effect of introducing such material far outweighs any probative value it might have. *People v. Sandoval*, 34 N.Y.2d 371 (1974); *People v.*

Ventimiglia, 52 N.Y.2d 350 (1981).

Mr. Balogh reserves the right to make supplemental motions.

No prior application for the relief herein requested has been made.

WHEREFORE, the undersigned requests that to forgoing motions be granted and requests such other and further relief as this Court may deem just and proper.

DATED:
BRONX, NEW YORK
March 7, 2023

/s/ *Samantha Tucker*
SAMANTHA TUCKER, Esq.
THE BRONX DEFENDERS
360 East 161st Street
Bronx, New York 10451
(646) 780-9863
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**SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: PART 11**

-----X
THE PEOPLE OF THE STATE OF NEW YORK

-against-

**AFFIRMATION IN
OPPOSITION TO
DEFENDANT'S
MOTION TO DISMISS**

MATA BALOGH

**INDICTMENT
IND- 70327-23**

Defendants.

-----X
1. I, **RACHEL TAVERNA**, under penalty of perjury and pursuant to C.P.L.R. § 2106, hereby affirms and states:

2. I am an Assistant District Attorney in the Office of **Darcel D. Clark**, District Attorney of Bronx County and am presently assigned to Trial Bureau 40.

3. I am familiar with the facts and proceedings had herein to date on this case. This answering affirmation is made in response to defendant's motion to dismiss and opposition of defendant's omnibus motion the captioned matter pursuant to C.P.L. §30.30. This matter is next scheduled to be heard in Part 11 on April 14, 2023.

4. I base this affirmation upon information and belief founded upon the records maintained in this matter by this Court and my Office, which I believe to be true and accurate.

PROCEDURAL HISTORY

On August 1, 2022, at approximately 10:19PM, in front of 2395 Valentine Avenue, Bronx County, the defendant exits the building and officers observe defendant to look in their directions, and observes defendant's pocket weighted with a heavy object. Officers then observed defendant

to place his hand inside his pocket, behind the object, causing the object to press against the fabric and make a visible L-Shaped object. Officers approached defendant, felt the L-shaped object, confirmed it was a firearm and removed the firearm from defendant's person. The firearm recovered was loaded with seven (7) rounds, model Polymer P80 (also known as a Ghost gun) and found to be operable.

On August 2, 2022, the defendant was arraigned on the Criminal Court Felony Complaint for Criminal Possession of a Weapon in the 2nd Degree and other related charges.

On January 25, 2023, the defendant was indicted on Criminal Possession of a Weapon in the 2nd Degree and other related charges.

On January 30, 2023, the People filed a Certificate of Compliance and Statement of Readiness.

On February 15, 2023, the defendant was arraigned on the indictment for charges of Criminal Possession of a Weapon in the 2nd Degree and other related charges. The defendant entered a plea of not guilty, a motion schedule was set, and the case was adjourned for decision to Part 11. The People stated ready for trial on the record, as a Certificate of Compliance and Statement of Readiness was filed on January 30, 2023.

On March 7, 2023, the People received defendant's Omnibus Motion and defendant's Motion to Dismiss under C.P.L. § 30.30.

The case is currently pending in Part 11 before the Honorable Justice Mitchell.

MOTION

Defendant now moves to: 1) Dismiss the instant matter pursuant to C.P.L. § 30.30; 2) Dismiss pursuant to the 2nd Amendment, 3) Inspect and Dismiss the indictment, 4) Suppress the

defendant's statement or grant Huntley/Dunaway hearings; 5) Suppress the physical evidence or grant Mapp/Dunaway hearings; and 6) Grant such additional relief as the court deems just and proper.

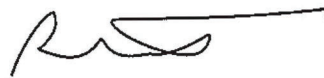
Unless otherwise stated herein, this affirmation is made upon information and belief, the source of which is an investigation of the confidential file of the District Attorney's Office, records of all the proceedings heretofore had, a reading of the moving papers filed herein, and conversations with witnesses wherein.

Pursuant to People v. Gruden, 42 N.Y. 2d 214 (1977), the People specifically deny every factual allegation contained in Defendants motions unless herein admitted to be true; or unless "conclusively substantiated by unquestionable documentary proof." C.P.L. 210.45 § (4) (C).

WHEREFORE, the People of the State of New York respectfully request that defendant's motion be denied in its entirety.

DATED: Bronx, New York
March 27, 2023

Respectfully submitted,



Rachel Taverna
Assistant District Attorney
Trial Bureau 40

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 11**

-----X
THE PEOPLE OF THE STATE OF NEW YORK

-against-

MEMORANDUM IN OPPOSITION

MATA BALOGH,

INDICTMENT IND-70327-23

Defendants.

-----X

MEMORANDUM OF LAW

Darcel D. Clark
District Attorney
Bronx County
198 E. 161st Street
Bronx, NY 10451

Rachel Taverna
Assistant District Attorney
Of Counsel

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 11

-----X
THE PEOPLE OF THE STATE OF NEW YORK

-against-

AFFIRMATION IN OPPOSITION

MATA BALOGH

INDICTMENT IND-70327-23

Defendants.

-----X

MEMORANDUM OF LAW
STATEMENT

The People submit this memorandum of law in opposition to defendant's motion to dismiss the above-captioned matter.

THE FACTS

The facts upon which this memorandum relies are contained within the annexed affirmation of Assistant District Attorney Rachel Taverna, dated March 27, 2023.

GENERAL OPPOSITION TO THE DEFENDANT'S MOTION FOR DISMISSAL
PURSUANT TO C.P.L. §30.30

The Defendant's argument pursuant to CPL § 30.30 is meritless and should be denied, because the People have not exceeded their speedy trial time. The People must be ready for trial within six months, or 184 days in this case, of the commencement of a criminal action wherein the defendant is accused of a felony as the top charge. CPL § 30.30(1)(a); see People v. Pierre, 8 A.D.3d 201 (1st Dept.), *lv denied* 3 N.Y.3d 710 (2004), and People v. Rhee, 111 A.D.2d 655 (1st Dept.), *lv denied* 65 N.Y.2d 929 (1985).

The defendant has the initial burden in a motion to dismiss pursuant to C.P.L. § 30.30 to allege that his right to a speedy trial has been violated. See People v. Luperon, 85 N.Y.2d 71, 77-

78 (1995). Once defense has met this initial burden, the burden shifts to the People to prove “that certain periods within that time should be excludable” from the C.P.L. § 30.30 calculation.

See People v. Berkowitz, 50 N.Y.2d 333, 349 (1980).

Certain periods of time are excluded from this statutory requirement and cannot be charged to the People. See CPL §30.30(4). Thus, to determine whether the People have satisfied this obligation, one must compute “the time elapsed between the filing of the first accusatory instrument and the People’s declaration of readiness, subtracting any periods of delay that are excludable under the terms of the statute and then adding to the result any post readiness periods of delay that are actually attributable to the People and are ineligible for an exclusion.” People v. Cortes, 80 N.Y.2d 201, 208 (1992).

In the instant matter, the defendant was arraigned on August 2, 2022. The defendant was informed that the top charge before the court was a felony. Pursuant to CPL § 30.30(1)(a), the People had six months or to be ready for trial. The People have not exceeded the statutory speedy trial time limit set by CPL § 30.30 and therefore, defendant’s motion to dismiss should be denied.

**ONE HUNDRED EIGHTY ONE (181) DAYS ARE CHARGEABLE TO THE
PEOPLE AS TO DEFENDANT FOR PURPOSES OF C.P.L. § 30.30**

The People oppose defendant’s motion pursuant to C.P.L. § 30.30 and on the grounds that the People have used one hundred eighty one (181) days of chargeable time as to the defendant of the six months of “speedy trial” time. The People’s calculation as to “speedy trial” time is as follows:

August 1, 2022 – August 5, 2022:

In this matter, the defendant was arrested August 1, 2022 for Criminal Possession of a Weapon in the Second Degree and other related charges. The defendant was arraigned on the felony complaint on August 2, 2022. The case was adjourned to August 5, 2022 for Grand Jury Action.

Therefore, the only time chargeable to the People was from August 3, 2022-August 5, 2022 as the Criminal Court arraignment is not chargeable to the People. The day the criminal action is commenced, that being the first day of the statutory period is excluded from C.P.L. § 30.30 calculations. People v. Stiles, 70 N.Y.2d 765, (1987).

Time charged: **3 days**

Total time charged: **3 days**

August 5, 2022 – January 26, 2023:

On August 5, 2022, the case was on for Grand Jury Action. The case was not yet presented to the Grand Jury. The indictment charging the defendant with Criminal Possession of a Weapon in the Second Degree and other related charges was filed on January 25, 2023

Time charged: **174 days**

Total time charged: **177 days**

January 26, 2023 – February 15, 2023:

On January 26, 2023, since there was an indictment filed, the case was adjourned for Supreme Court arraignment.

On January 30, 2023, the People filed a Certificate of Compliance and Statement of

Readiness with the Court through EDDS and served the same on defendant. Courtesy copies of all filings were also provided to the Court via email on January 30, 2023. (See Exhibit 1).

The People stated ready for trial on this date, thus this period of delay is not charged to the People. *See, e.g., People v. Smith*, (1993).

Time charged: **4 days**

Total time charged: **181 days**

February 15, 2023 – April 14, 2023:

On February 15, 2023, the defendant was arraigned on the indictment. Additionally, a motion schedule was set by the Court. The People maintained their readiness as the People and served a Certificate of Compliance and Statement of Readiness on January 30, 2023.

Pursuant to CPL 30.30(4)(a), and People v. Batts, 227 A.D.2d 224 (1st Dept. 1996), the time period during which a pre-trial motion was under consideration by the court was properly excludable time. See People v. Kelly, 33 A.D.3d 461 (1st Dept.), *lv denied* 7 N.Y.3d 926 (2006).

Time charged: **0 days**

Total time charged: **181 days**

CONCLUSION – C.P.L. 30.30 MOTION TO DISMISS

Defendant claims to have not received the affirmations of service regarding this case. The People emailed the Court, at that time Part GWP, all documents that were filed through EDDS; the People's Automatic Disclosure Form, Certificate of Compliance, Statement of Readiness and affirmations of service with proof of filing with the EDDS filing receipt. Defense counsel was copied on that email. Additionally, that email was then forwarded to Part 11, since the case was

transferred once defendant was indicted. See Exhibit 1.

All filings with the Court through EDDS, that were also provided to defendant are attached hereto as Exhibit 2.

For the foregoing reasons, defendant's motion to dismiss pursuant to C.P.L. § 30.30 should be denied in all respects, as the People have one hundred and eighty one (181) days of chargeable time under C.P.L. § 30.30, within the six month period of one hundred eighty four (184) days.

INSPECT AND DISMISS

The People oppose the defendant's request for release of grand jury minutes and the People further oppose the defendant's motion to dismiss the present indictment. The proceedings of the grand jury are secret, and defendant puts forth no reason why that secrecy should be abrogated. See C.P.L. § 190.25(4). This is a case where the Court can, without the interjection of defense counsel, determine the sufficiency of the evidence presented to the grand jury and the propriety of its proceedings. The People consent to an in camera inspection of the grand jury minutes pursuant to C.P.L. § 210.30. A copy of the grand jury minutes pertaining to this indictment is provided to the Court at the time of the filing of this affirmation.

The People oppose the defendant's motion to dismiss the present indictment, indictment number IND-70327-23, or in the alternative to reduce the charges contained therein on the basis of insufficiency of grand jury evidence under C.P.L. § 210.30. If the Court inspects the grand jury minutes, the minutes will show that the evidence before the grand jury was legally sufficient to support the charges contained in the indictment. Therefore, defendant's motion to dismiss the indictment or any charges therein should be denied.

The indictment in this case is not defective under C.P.L. § 210.20 and § 210.25. The

indictment substantially conforms to the requirements in the C.P.L., and any defect or irregularity can be cured by amendment. The defendant has not alleged any basis to demonstrate that the court does not have jurisdiction over the offense charged or that the statutes defining the offenses charged are unconstitutional. Therefore, the defendant's motion should be denied.

The grand jury proceeding was proper and not defective under C.P.L. § 210.35. The defendant has failed to allege any facts demonstrating a specific defect in the grand jury proceedings. The grand jury was legally constituted, the instructions were proper, a proper quorum existed during all aspects of the proceedings, and the proceeding otherwise conformed to the requirements under the C.P.L. such that the integrity was not impaired, and the defendant was not prejudiced. Therefore, defendant's motion to dismiss the indictment should be denied.

**OPPOSITION TO MOTION TO DISMISS AS NEW YORK'S GUN LAWS ARE
UNCONSTITUTIONAL**

Defendant argues that the weapon possession charges should be dismissed on the ground that New York's gun prohibitions violate the Second Amendment of the United States Constitution. In support of that assertion, defendant cites the Supreme Court's recent decision in *New York State Rifle & Pistol Assn. v. Bruen*, 142 S. Ct. 2111 (2022). For the reasons stated below, defendant's claim lacks merit. In particular, defendant lacks standing to challenge the constitutionality of New York's gun laws, because unlike the plaintiffs in *Bruen*, he made no effort to purchase a gun lawfully or to obtain a gun license. Further, contrary to defendant's contention, the Supreme Court's decision in *Bruen* did not legalize his possession of an unlicensed firearm.

A. Facts and Procedural History

- B. The facts upon which this memorandum relies are contained within the annexed affirmation of Assistant District Attorney Rachel Taverna, dated March 27, 2023.

B. Background: New York's Gun Licensing Scheme and the *Bruen* Decision

1. New York's Gun Licensing Scheme

Under New York law, it is illegal to possess an unlicensed firearm. The degree of crime depends on various factors, including whether the firearm is loaded, whether it is possessed outside of one's home or place of business, and whether the defendant harbors the intent to use the firearm unlawfully.

For instance, under Penal Law § 265.01(1), a person who possesses "any firearm" is guilty of Criminal Possession of a Weapon in the Fourth Degree, a class A misdemeanor. If the defendant has previously been convicted of a crime, the charge can be elevated to Criminal Possession of a Weapon in the Third Degree, a class D felony. Penal Law § 265.02(1). Additionally, possession of a loaded firearm outside one's home or place of business, possession of a loaded firearm by a person previously convicted of a crime, or possession of any firearm with the intent to use it unlawfully against another constitutes a class C felony offense. Penal Law §§265.03(1)(b), (3).

A person may avoid criminal liability for possession of a firearm if he or she has a valid gun license issued by a New York licensing authority. Pertinent here, under Penal Law § 265.20(3), a licensed owner of a pistol or a revolver is exempt from prosecution from weapon possession under the above-referenced statutes (as well as other, specified weapon possession statutes). Specifically, under section 265.20(3), the possession of a valid New York gun license is an affirmative defense to the charge – the prosecutor is not required to prove unlicensed possession in order to present a legally sufficient case. *See People v. Washington*, 209 A.D.2d 162, 163 (1st Dept. 1995). Further, New York does not give effect to out-of-state gun licenses, except in certain limited circumstances such as police officers conducting official business in New York and

nonresidents attending certain competitive shooting events. *See* 1997 N.Y. Atty. Gen. Op. 14, 1997 WL 136367 (March 13, 1997).

To obtain a gun license in New York, an applicant must submit to an investigation, and the licensing officer must find that “all statements in a proper application for a license are true.” Penal Law § 400.00(1). The applicant must be 21 years of age or older and of good moral character. Penal Law § 400.00(1)(a)-(b). An applicant may be disqualified if, among other things, he or she has a prior conviction for a felony or other serious offense, has an outstanding warrant for a felony or a serious offense, is a fugitive from justice, has a history of mental illness, or has an outstanding order of protection – or if there is any other “good cause” for the denial of the license. *See* Penal Law § 400.00(1)(c)-(n).

Further, at the time of the instant offense, to obtain a license permitting the carrying of a concealed firearm outside of one’s home or place of business, an applicant was required to show “proper cause,” *see* Penal Law § 400.00(2)(f) (former), which was defined as “a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.” *Matter of Klenosky v. New York City Police Dept.*, 75 A.D.2d 793 (1st Dept. 1980), *aff’d*, 53 N.Y.2d 685 (1981).¹

2. The Supreme Court’s Second Amendment Decisions: *Heller* and *Bruen*

Contrary to defendant’s argument, the Supreme Court has never held that a person has the right to possess an unlicensed firearm. Nor has the Court prohibited states and local governments from requiring that a person obtain a permit in order to carry a handgun in public. Further, the

¹ Following the *Bruen* decision, the Legislature eliminated the “proper cause” requirement for obtaining a concealed carry permit. In its place, the Legislature substituted additional requirements, including the completion of a training class, an expanded background check including character references, a review of social media accounts, an in-person interview, and an expanded list of disqualifying prior convictions. *See* L.2022 Ch.371 (enacted July 1, 2022).

Court has not prohibited states and local governments from making a distinction between the possession of a handgun in the home and in a public place. Instead, as demonstrated below, the Court has held only that (1) a locality may not enact a *complete* ban on the possession of handguns in the home for self-defense and (2) a law-abiding citizen – who has submitted to a full background check – may not be denied a concealed carry permit on the ground that he has failed to demonstrate a greater need than other members of the public to carry a handgun for self-defense.

The pertinent decisions can be briefly summarized. In *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), the Supreme Court held that the District of Columbia’s “ban on handgun possession in the home violate[d] the Second Amendment, as [did] its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.” In *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010), the Court applied this right to possess a firearm to the states.

Critically, in *Heller*, the Court made clear that “the right secured by the Second Amendment is not unlimited.” *Heller*, 554 U.S. at 626. The Court observed that the right to keep and bear arms “was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Id.* For instance, the Court declared that “nothing” in the *Heller* decision “should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.” *Id.* The Court added that the Second Amendment did not prohibit localities from enacting “laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 626-27. The Court noted, too, that it “identif[ied] these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.” *Id.* at 627 n.26; *accord McDonald*, 561 U.S. at 786.

The Court's recent decision in *Bruen* did not disturb those holdings. In *Bruen*, two individual plaintiffs and the New York State Rifle and Pistol Association challenged New York's "proper cause" requirement for the issuance of a concealed carry permit. The two individual plaintiffs were "law-abiding, adult citizens" of New York State who had applied for "unrestricted" licenses to carry a handgun in public. *See Bruen*, 142 S. Ct. at 2124-25. Both plaintiffs submitted to – and passed – the background checks required at the time and were issued restricted licenses, which allowed them to carry handguns outside the home for certain limited purposes, such as hunting and target shooting. However, because the plaintiffs had not demonstrated a special need to carry a concealed weapon in public for self-defense, the licenses prohibited them from carrying their weapons in areas typically frequented by the general public. *See id.*

In *Bruen*, the Supreme Court considered a narrow question: whether New York could require a law-abiding citizen who applied for a concealed carry permit to demonstrate "proper cause" – that is, a "special need" to carry a weapon in public for self-defense. *See Bruen*, 142 S. Ct. at 2123. The Court issued a comparably narrow ruling, holding that the Second Amendment protects the right to carry a weapon in public for self-defense, which may not be conditioned on "demonstrating to government officers some special need." *Bruen*, 142 S. Ct. at 2156. The Court held, therefore, that "New York's proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms." *Id.*

Significantly, the Court did not disturb any other aspect of New York's gun licensing scheme. In fact, the Court reiterated that the Second Amendment right was subject to "well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms." *Bruen*, 142 S. Ct. at 2138.

Instead, in invalidating New York’s “proper cause” requirement, the Court focused on the level of discretion that this standard conferred on licensing officers. The Court observed that 43 states issued “concealed-carry licenses whenever applicants satisfy certain threshold requirements, without granting licensing officials discretion to deny licenses based on a perceived lack of need or suitability.” *Id.* at 2123. The Court declared that nothing in its “analysis should be interpreted to suggest the unconstitutionality of the 43 States’ ‘shall-issue’ licensing regimes, under which a general desire for self-defense is sufficient to obtain a [permit].” *Id.* at 2138 n.9 (internal quotation omitted). The Court added that, in contrast to New York’s “proper cause” rule, “these licensing regimes do not require applicants to show an atypical need for armed self-defense.” *Id.* The Court emphasized that the regimes of the 43 other states, “which often require applicants to undergo a background check or pass a firearms safety course,” were proper, as they were “designed to ensure only that those bearing arms in the jurisdiction are, in fact, ‘law-abiding, responsible citizens.’” *Id.* (quoting *Heller*, 554 U. S. at 635).

Concurring in *Bruen*, Justice Kavanaugh (joined by the Chief Justice) observed that “the Court’s decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense.” *Bruen*, 142 S. Ct. at 2161 (Kavanaugh, J., concurring). Justice Kavanaugh remarked that the “shall-issue” licensing regimes employed by 43 states passed constitutional muster – and that “the 6 States including New York potentially affected by today’s decision may continue to require licenses for carrying handguns for self-defense so long as those States employ objective licensing requirements like those used by the 43 shall-issue States.” *Id.* at 2161-62. Justice Kavanaugh recounted the holding of *Heller* that “the Second Amendment allows a variety of gun regulations,” including “prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as

schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 2162 (Kavanaugh, J., concurring) (internal quotation marks omitted).

Justice Alito echoed those comments, observing that the Court had not “disturbed anything that we said in *Heller* or *McDonald* ... about restrictions that may be imposed on the possession or carrying of guns.” *Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring). Justice Alito added that the *Bruen* “holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun.” *Id.*

Thus, the Supreme Court’s opinion in *Bruen* – along with concurring opinions joined by three of the six Justices in the *Bruen* majority – make clear that New York may continue to require that a person obtain a license to purchase or possess a firearm, and it may continue to require that a person obtain a concealed carry permit in order to carry a handgun in public. The only caveat is that, when a person applies for a concealed carry permit, the state may not require the applicant to show a “special need” to carry a firearm for self-defense. In all other respects, the Court left New York’s licensing scheme undisturbed.

C. Argument: Defendant’s motion to dismiss the weapons charges should be denied.

1. Defendant lacks standing to raise a Second Amendment claim, because unlike the plaintiffs in *Bruen*, he did not apply for a gun license.

Initially, defendant lacks standing to challenge the application of New York’s gun licensing laws to him, because unlike the plaintiffs in *Bruen*, defendant did not attempt to obtain a gun lawfully, nor did he apply for a license. Courts have long held that if a defendant “failed to apply for a gun license in New York, he lacks standing to challenge the licensing laws of the state.” *United States v. Decastro*, 682 F.3d 160, 164 (2d Cir. 2012); accord *People v. Miller*, 2022 WL 2137357, at *1 (Sup. Ct. Bronx Co. Apr. 12, 2022). After all, as a general rule, a person may not

challenge the constitutionality of a regulatory scheme without first making a good faith effort to “submit to the challenged policy.” *Decastro*, 682 F.3d at 164; *see Allen v. Wright*, 468 U.S. 737, 746, 755 (1984) (parents lacked standing to challenge the tax-exempt status of allegedly racially discriminatory private schools to which their children had not applied); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-68 (1972) (plaintiff lacked standing to challenge the allegedly discriminatory membership policy of a club to which he never applied).

There is a good reason for this rule. As explained, in *Bruen*, the Supreme Court did not hold that citizens have an unfettered right to carry concealed weapons in public. Nor did the Court invalidate New York’s laws criminalizing the unlicensed possession of firearms. And, the Court made clear that individuals with prior felony convictions or a history of mental illness, among other things, may be denied the right to possess a gun. The Court merely held that a law-abiding citizen applying for a concealed carry permit cannot be required show “proper cause” – that is, an “atypical need for armed self-defense.” *Bruen*, 142 S. Ct. at 2138 n.9.

Thus, because the Supreme Court left the large majority of New York’s gun licensing laws intact – including the requirement of a background check and criminal record check – it would be anomalous to permit defendant to challenge those regulations without submitting to a background check. Because defendant did not submit to the licensing process here, he should not be heard to raise a Second Amendment challenge to the weapons charges. *Decastro*, 682 F.3d at 164.

The Court’s First Amendment jurisprudence – *see, e.g., Staub v. City of Baxley*, 355 U.S. 313 (1958) – does not alter this conclusion. After all, there are critical differences between the First and Second Amendment rights. As explained, the right to bear arms can be denied to people whose backgrounds indicate that their possession of a weapon poses a danger to the public. By contrast, individuals need not submit to a background check before exercising their First

Amendment right to speak. A person whose freedom of speech is restricted by an unconstitutional licensing regime need not, therefore, submit to a licensing process in order to challenge the constitutionality of the licensing scheme. By contrast, because states have the right to impose rules regarding who may own a firearm, a prospective gun owner must submit to the process – including a full background check – before asserting his Second Amendment rights in court. Indeed, as noted, the plaintiffs in *Bruen* submitted to – and passed – background checks before suing to challenge the denial of their applications for unrestricted carry permits.

Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969), is likewise inapposite. In *Shuttlesworth*, the Court reversed the conviction of a Black minister for leading a peaceful civil rights protest, in 1963 Alabama, without obtaining a permit. The Court ruled that the minister could “ignore” Alabama’s blatantly unconstitutional permitting law – which gave the city “virtually unbridled and absolute power” to prohibit demonstrations – in order to exercise “the right of free expression.” *Id.* 148-51. Obviously, there is a stark difference between leading a peaceful civil rights protest in the segregated south and carrying an illegal, unlicensed firearm on the streets of New York. Alabama’s parade permitting law was – as the Supreme Court recognized in *Shuttlesworth* – being used as a tool of oppression to suppress protected speech. By contrast, as the Supreme Court recognized in *Heller* and reiterated in *Bruen*, gun licensing schemes are permissible in order to permit public safety. While Reverend Shuttlesworth was justified, under the First Amendment, in ignoring Alabama’s unconstitutional “prior restraint” on speech, *see id.* at 151, defendant was not permitted to ignore the perfectly valid aspects of New York’s licensing scheme that rendered his conduct illegal here.

Notably, while the *Bruen* decision cited *Shuttlesworth* in a footnote, it was only for the proposition that gun licensing schemes, to be valid, should not give unbridled discretion to

licensing officials and instead should “contain only ‘narrow, objective, and definite standards.’” *Bruen*, 142 S. Ct. 2111, 2138 n.9 (quoting *Shuttlesworth*, 394 U.S. at 151). Indeed, in that same footnote, the Court observed that states may enforce gun licensing schemes that require background checks and firearms safety courses in order to ensure that “those bearing arms in the jurisdiction are, in fact, ‘law-abiding, responsible citizens.’” *Bruen*, 142 S. Ct. at 2138 n.9 (quoting *Heller*, 554 U.S. at 635). Defendant, therefore, should not be heard to argue that the citations to First Amendment cases in *Bruen* indicate that individuals may carry illegal firearms on city streets without making any attempt to obtain a gun license.

Not surprisingly, following *Bruen*, at least two New York courts – citing the Second Circuit’s holding in *Decastro* – have held that a defendant who fails to apply for a license lacks standing to raise a Second Amendment claim. *See People v. Dave Brown*, Ind. No. 71673-22 (Sup. Ct. Bronx Co. July 15, 2022) (Fabrizio, J.); *People v. Rodriguez*, 2022 NY Slip Op 22217 (Sup. Ct. N.Y. Co. July 15, 2022). This Court should reach the same conclusion.

To be sure, following the Supreme Court’s decision in *Heller*, the local District of Columbia courts permitted certain defendants to challenge their gun convictions even if they had not attempted to obtain gun licenses. *See Plummer v. United States*, 983 A.2d 323 (D.C. App. 2009), *as amended on denial of rehearing and rearg.* (May 20, 2010). *Plummer* and its progeny, however, are distinguishable from the case at hand. In *Plummer*, the defendant was convicted of violating the District of Columbia’s *complete* ban on handgun ownership by ordinary citizens, which was subsequently ruled unconstitutional in *Heller*. *See id.* at 324-26. On appeal, the court ruled that the defendant could raise a Second Amendment challenge to his conviction, even though he had not applied for a gun license. The court explained that the District’s “absolute prohibition” on gun ownership “effectively foreclosed any attempt to exercise his Second Amendment right.” *See id.*

at 342.

Plummer arose in circumstances far different from the case at hand. Critically, *Plummer* concerned a District of Columbia law that imposed an “absolute prohibition” on gun ownership by ordinary citizens. New York, by contrast, does not prohibit ordinary citizens from owning and carrying guns. In fact, New York law permits ordinary citizens to apply for gun licenses if they submit to a background check and satisfy various other requirements – including numerous requirements that were not disturbed by *Bruen*. Here, therefore, unlike the defendant in *Plummer*, defendant was not precluded by New York law from obtaining a gun license. Instead, defendant could have obtained a license if he had submitted to, and passed, a background check. Hence, the Second Circuit’s decision in *Decastro* – and not *Plummer* – controls, and defendant lacks standing to challenge his conviction on Second Amendment grounds.

Beyond that, *Plummer* does not support defendant’s claim that the charges against him should be dismissed. In *Plummer*, the court recognized that a person may be ““disqualified”” from exercising his Second Amendment rights based on factors such as “age, criminal history, mental capacity, and vision.” *Plummer*, 983 A.2d at 342 (quoting *Heller*, 554 U.S. at 635). The court, therefore, remanded the case for a hearing to determine whether the defendant would be disqualified from gun ownership based on the “applicable statutory and regulatory requirements for obtaining a registration certificate and license for his handgun.” *Id.* Thus, even if this Court were to find, under *Plummer*, that defendant has standing to raise a Second Amendment claim, he would not be entitled to a dismissal of the charges. Instead, at most, he would be entitled to a hearing, at which the court could examine his background – including a full inquiry into his criminal history and mental health – to determine whether he is qualified to obtain a gun license under the numerous New York licensing provisions that *Bruen* left undisturbed.

For instance, New York requires an applicant for a gun license to disclose whether he or she has “ever been arrested, summoned, charged or indicted anywhere for any offense, including DWI (except traffic infractions),” to disclose any mental illness or illegal drug use, and to provide the names of four character references.² *Bruen* did not invalidate any of those requirements. Defendant, however, has not made those disclosures here, nor has he provided the names of references. Therefore, even if defendant had standing to raise a Second Amendment claim, the record is insufficient to determine whether he in fact has the right to possess a gun in New York. *See People v. Kinchen*, 60 N.Y.2d 772, 774 (1983) (record insufficient to permit review of defendant’s right to counsel claim).

In short, because defendant failed to apply for a gun license, he lacks standing to raise a Second Amendment claim. Indeed, defendant has not submitted to a full background check and mental health evaluation – standard requirements for a gun license that *Bruen* left undisturbed. Therefore, defendant not only has denied the licensing authority the opportunity to conduct a full investigation of his background, but he has failed to create an adequate record to permit review of his Second Amendment claim. Accordingly, defendant’s motion to dismiss the weapons charges should be denied.

2. The Supreme Court’s decision in *Bruen* invalidated only a single aspect of New York’s gun licensing scheme and left the remainder of New York’s gun laws intact.

Beyond that, defendant’s broad constitutional challenge to the weapons charges fails for a more fundamental reason. Contrary to defendant’s assertion, the Supreme Court’s decision in *Bruen* did *not* undermine New York’s gun licensing scheme as a whole. Instead, the only provision of New York law at issue in *Bruen* was the requirement that an applicant for a concealed carry

² See <https://troopers.ny.gov/system/files/documents/2020/12/ppb-3.pdf> (last visited July 26, 2022).

permit demonstrate “proper cause” – that is, a special reason why the applicant needed to carry a gun in public for self-defense. Here, the charges against defendant are based on the fact that he did not obtain a gun license *of any sort* – not because he failed to demonstrate “proper cause” for a concealed carry permit. As discussed, to obtain *any* gun license, defendant would have had to satisfy numerous other conditions that the Supreme Court left undisturbed in *Bruen*. Those conditions remain valid, as they can easily be severed from the “proper cause” requirement that the Supreme Court invalidated.

If the federal courts declare only part of a state statute unconstitutional, it is a matter of state law whether the remainder of the statute survives. *See generally City of New Orleans v. Dukes*, 427 U.S. 297, 302 (1976) (it is a “state-law question” whether the challenged statute “will be totally invalidated” or whether only the unconstitutional portion “will be struck down”); *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 389 (2d Cir. 2000) (whether the unconstitutional portion may be severed from the remainder of the statute “is a matter governed by state law”). In New York, the “basic rule governing severability” turns on “whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part excised, or rejected altogether.” *CWM Chem. Servs., L.L.C. v. Roth*, 6 N.Y.3d 410, 423 (2006) (quoting *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60 (1920) (Cardozo, J.)). That question must be answered “pragmatically, by the exercise of good sense and sound judgment.” *Id.* (quoting *Knapp*, 230 N.Y. at 60).

Here, the Legislature surely would have preferred excising the “proper cause” requirement to invalidating New York’s entire gun licensing scheme. After all, the Supreme Court merely invalidated one small part of the scheme – creating an additional, “proper cause” requirement for obtaining a concealed carry permit – and left intact the detailed statutory provisions requiring a

license to buy, sell, or possess a gun. *See* Penal Law § 400.00. Obviously, the legislative intent was to forbid the unlicensed sale, purchase, possession, and carrying of firearms. Certainly, then, the Legislature would not have wanted the invalidation of the “proper cause” requirement to cause the remainder of the licensing scheme to fall.

Further, the pre-*Bruen* licensing scheme can be enforced without the proper cause requirement. Indeed, as Justice Kavanaugh noted, the concealed carry licensing scheme can instead be reinterpreted as a “shall-issue” statute, allowing a person to obtain a concealed carry permit if he or she satisfies all of the remaining (and valid) conditions for the issuance of a license. In the Legislature’s view, that result would undoubtedly have been preferable to invalidating the entire licensing scheme, which would allow anyone – regardless of their background, history, and character – to carry a firearm in public.

Moreover, *Bruen* was a civil case in which the plaintiffs were law-abiding citizens who submitted to background checks and followed lawful processes when purchasing firearms. The *Bruen* plaintiffs did not seek to take the law into their own hands by obtaining guns illegally and carrying those unlicensed firearms on city streets. The *Bruen* decision, therefore, does not implicate New York’s *criminal* laws forbidding possession of unlicensed firearms, as those laws, by definition, do not apply to law-abiding citizens. *See Rodriguez*, 2022 NY Slip Op 22217, *supra*, at *2-*3 (*Bruen* “did not hold that the State is powerless to criminalize the unlicensed possession of firearms on city streets”); *Brown*, No. 71673/22, *supra* (“*Bruen* cannot be read to require dismissal of this action charging defendant with unlicensed possession of a firearm in a public place”); *People v. Radhiid Monroe*, Ind. No. 232/2021 (Sup. Ct. Bronx Co. July 14, 2022) (rejecting defense claim that, under *Bruen*, “a license was not required to carry a handgun for self-defense outside the home”).

Indeed, as the *Rodriguez* court explained, “[d]efendant’s reading of the Second Amendment, unsupported by *Bruen*, would turn New York into the Wild West, placing its citizens at the mercy of criminals wielding unlicensed firearms, concealed from public view, in heavily populated areas.” *Rodriguez*, 2022 NY Slip Op 22217, *supra*, at *3. The court continued, “Defendant misreads *Bruen* as eviscerating the police powers of the State to address criminality, or as applying to anyone other than law-abiding citizens. Failing to seek a license before roaming the streets with a loaded firearm is not abiding by the law, and nothing in the Second Amendment requires that it be tolerated. The Constitution is not a suicide pact.” *Id.*

In short, the *Bruen* decision – while making it easier to obtain a concealed carry permit – did not invalidate the remainder of New York’s gun licensing scheme. And certainly, *Bruen* did not, in the blink of the eye, legalize the unlicensed possession of firearms on the streets of New York City. Therefore, defendant’s motion to dismiss the weapons charges should be denied.

* * *

In sum, for all the reasons stated above, this Court should reject defendant’s Second Amendment challenge to the weapons counts.

**OPPOSITION TO MOTION TO SUPPRESS PHYSICAL EVIDENCE OR FOR
MAPP/DUNAWAY HEARINGS**

The People oppose the defendant’s motion to suppress physical evidence or, in the alternative, for a Mapp/Dunaway hearing, as probable cause existed to arrest the defendant and the physical evidence recovered is, therefore, the product of the defendant’s lawful arrest.

Under C.P.L. § 710.60(1), a motion to suppress evidence must contain sworn allegations of fact supporting the grounds for suppression. C.P.L. § 710.60(3)(b) excludes certain areas of

suppression from this requirement; however, a motion to suppress physical evidence is not one of those exceptions. As such, the defendant's motion to suppress physical evidence should be denied, as the defendant's motion to suppress does not contain sufficient sworn allegations of fact to justify a hearing. *See People v. Arokium*, 33 A.D.3d 458 (1st Dep't 2006) (holding that the defendant's assertions of innocent conduct at the time of his arrest, and his general denial of "the allegations in the accusatory instrument" failed to controvert the specific information that was provided by the People.)

The language contained in the defendant's motion is similar to that in *People v. Springs*, 58 A.D.3d 541 (1st Dep't 2009), where a defendant's motion was summarily denied when "the defendant merely claimed, in a conclusory manner, that he had lawfully entered the building" and that he was not engaged in "any illegal or illicit behavior at the time of his arrest or at [any time] prior to his arrest." However, the defendant in *Springs*, much like the defendant here, did not address the specific allegations set forth in the complaint. For instance, without further clarification, the defendant's motion papers allege that the search of the defendant was unlawful because the defendant was "not engaged in any criminal activity" nor did the police have probable cause to search and thus, the police action was unlawful, and that the physical evidence allegedly recovered should be suppressed in addition to any observations by the police. *See also People v. Mendoza*, 82 N.Y.2d 415, 422 (1993) ("Hearings are not automatic or generally available for the asking by boilerplate allegations."); *see also* C.P.L. § 710.60.

In the case at bar, there is no question that probable cause existed to arrest the defendant. Here, the officers, while on patrol, observed the defendant exit a building with a weighted, heavy object in his pocket. Officers then observed defendant to place his hand inside the pocket, behind the object, causing the object to protrude an outline through the fabric, and making visible the L-

shaped object. Officers approached the defendant and recovered a Polymer 80 firearm (also known as a Ghost gun), loaded with (7) rounds.

Without alleging specific facts that controvert the allegations contained in the complaint, the defendant has failed to establish a factual issue in regards to the probable cause to arrest defendant. Therefore, the defendant's motion for a Mapp/Dunaway hearing should be denied.

**OPPOSITION TO MOTION TO SUPPRESS STATEMENTS OR FOR
HUNTLEY/DUNAWAY HEARINGS**

Statement notice was timely served at the defendant's arraignment, pursuant to CPL § 710.30(1)(a). The People oppose the defendant's motion to suppress statement evidence, and deny any and all allegations in support thereof. The People deny the defendant's factual allegations with respect to statements served, but consent to the defendant's request for a Huntley hearing. However, the People request that the scope of the hearing be so limited to resolve the voluntariness of the statement, seeing as the defendant has not set forth sworn allegations of fact that would give rise to a Dunaway hearing.

Pursuant to C.P.L. 710.60(1), motions to suppress "must contain sworn allegations of fact . . . based upon personal knowledge of the deponent or upon information and belief . . ." Hence, where the defendant fails to raise factual allegations, the court may summarily deny defendant's motion. People v. Mendoza, 82 N.Y.2d 415 (1993). C.P.L. §710.60(3)(b). In the present case, the defendant does not make any factual allegations, instead making only conclusory statements that go to an affirmative defense of self-defense.

While motions to suppress statements based on involuntariness are excepted from the Mendoza rule, defense motions to suppress statements on any other grounds still require sworn factual allegations. C.P.L. §§710.60(3)(b), 710.20(3). Here, the defendant's motion to suppress

the defendant's statements contains no factual allegations going to any of the grounds raised by the defense.

Consequently, the People respectfully request this court deny the defendant's motion to suppress all statements. Furthermore, the People oppose the Dunaway portion of the defendant's motion. The defendant's motions do not allege any factual allegations, nor have they disputed any factual issue that would warrant a pre-trial suppression hearing.

Additionally, the Court of Appeals has held that a defendant's suppression motion may be summarily denied if it does not raise any factual issues to be resolved at a hearing. Mendoza, 82 N.Y.2d at 426 (citing People v. Gruden, 42 N.Y.2d 214, 215 (1977)). Here, the defendant has failed to provide the Court with any questions of fact to be resolved at a hearing.

Further, these allegations do not dispute the allegations the People put forth to warrant the need for a Dunaway hearing as there is no factual issue in dispute on the question of probable cause. The allegations dispute facts before the incident the officer observed, not the facts occurring in the span of the officer's observations. In the absence of any facts to support these allegations, these allegations fall squarely into what the New York Court of Appeals considers to be outside the scope of sufficient factual allegations. Mendoza, 82 N.Y.2d at 431 (motion properly denied where the defense failed to make out factual allegations for which a hearing was sought and only included enough facts to make out a constitutional violation). A Dunaway hearing on this motion should be denied.

Moreover, the People oppose the Dunaway portion of the defendant's motion on the grounds that the police action did not constitute a warrantless, unlawful arrest of the defendant. The arresting officer had proper reasonable cause to arrest the defendant for criminal possession of a weapon. People v. Robinson, 97 N.Y.2d 341, 741 N.Y.S.2d 147 (2001). Therefore, under

these facts the officers had probable cause to arrest the defendant. *See Dunaway v. New York*, 442 U.S. 200 (1979).

Therefore, the People respectfully request that a Dunaway hearing on this motion be denied as there is no dispute on the facts presented in this current case and the officer had probable cause to make the arrest. Further, the defendant's motion does not provide factual allegations that warrant a pre-trial suppression hearing as they are issues to be presented and resolved at trial instead.

The People reserve the right to use any unnoticed statements during cross examination of the Defendant, pursuant to People v. Harris, 57 N.Y.2d 335, 343-346 (1982), or cross examination of a witness pursuant to People v. Reed, 4 A.D.3d 264 (1st Dept. 2005). It should also be noted that C.P.L. 710.30(1)(a) "does not require that such notice be provided where a statement made by a Defendant is used solely for the purpose of impeachment." People v. Rigo, 273 A.D.2d 258, 258-59 (2nd Dept. 2000).

Although there are certain types of statements which, pursuant to C.P.L. §710.30(1)(a), the People must serve notice on the Defendant of within 15 days of arraignment, not all statements made by the Defendant are required to have notice served under this section. For example, pedigree information given by the Defendant to law enforcement, *see People v. Rodney*, 85 N.Y.2d 289, 294 (1995), statements that constitute *res gestae*, *see People v Wells*, 133 A.D.2d 385 (2nd Dept. 1987), and statements made during the criminal transaction, *see People v. Garcia-Lopez*, 308 A.D.2d 366 (1st Dept. 2003), are situations where C.P.L. §710.30(1)(a) notice is not necessary. Therefore, the People oppose the preclusion of any statements for which C.P.L. §710.30(1)(a) notice is not required and oppose granting a hearing on the matter.

Furthermore, while the People are unaware of any additional statements that were made by Defendant to law enforcement, the People submit that should additional statements become known

to the People, the People will attempt to serve notice of those statements when they become known, provided sufficient good cause is shown for the People's delay in serving said statements.

In addition, should there be a statement or identification for which C.P.L. §710.30(1)(a) notice was required to be served within 15 days of arraignment and the People failed to serve notice, and no good cause exists to allow the People to serve notice at a later date, Defendant should not be entitled to complete preclusion. "[T]he statute does not require that such notice be provided where a statement made by a Defendant is used solely for the purpose of impeachment." People v. Rigo, 273 A.D.2d 258, 258-59 (2nd Dept. 2000).

Therefore, the People should be allowed to use any statement of the Defendant, which should have had notice served pursuant to C.P.L. §710.30(1)(a) and was not noticed, during cross-examination of the Defendant at trial, should the Defendant choose to testify.

**OPPOSITION TO MOTION TO SUPPRESS PRIOR CONVICTIONS AND BAD ACTS
OR FOR SANDOVAL/VENTIMIGLIA/MOLINEUX HEARINGS**

The People oppose the defendant's motion made pursuant to People v. Sandoval, 34 N.Y.2d 371 (1974), and request that the issue be deferred by the Court until just prior to jury selection for resolution when arguments by both sides can be heard on the merits. The defendant's demand for specific instances of the defendant's prior charged and uncharged criminal, vicious, or immoral conduct of which the prosecutor has knowledge and which the People intend to use at trial for purposes of impeaching the credibility of the defendant, pursuant to People v. Molineaux, 168 N.Y. 265 (1901) and People v. Ventimiglia, 52 N.Y.2d 350 (1981), is acknowledged. The People will provide this information, if any exists, prior to the commencement of jury selection.

The People request that the issue be deferred by the Court until just prior to jury selection for resolution when arguments by both sides can be heard on the merits.

DEMAND FOR BRADY MATERIAL

The People are aware of their Brady obligation to furnish the defendant with exculpatory information as well as favorable information to the defendant and will do so immediately if and when any such material becomes known to the District Attorney.

COMPLIANCE WITH REQUEST FOR DEMANDS FOR DISCOVERY

The People are aware of our discovery obligations pursuant to C.P.L. § 245. The People are compliant with our discovery obligations and filed an Automatic Disclosure Form, Certificate of Compliance and Statement of Readiness on January 30, 2023. The People will continue to comply with our obligations under C.P.L. § 245.

OPPOSITION TO RESERVATION OF RIGHTS AND ADDITIONAL RELIEF

The People oppose the filing of additional motions by defendant. The People request that any additional motions filed, and any motions filed after the forty-five (45) day period be summarily denied absent a showing of good cause. C.P.L. § 255.20(3).

WHEREFORE, the People respectfully request the defendants' motion be denied in all respects except as heretofore stated.

DATED: Bronx, New York
March 27, 2023

Respectfully submitted,



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To be argued by

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TIME REQUESTED: 10 MINUTES

New York Supreme Court

»»»»»

Appellate Division—First Department

»»»»»

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- *against* -

MATA BALOGH,

Defendant-Appellant.

Bronx County

Ind. No. 70327/23

ACN: 2023-03397

BRIEF FOR DEFENDANT-APPELLANT

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March 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
PRELIMINARY STATEMENT	1
QUESTIONS PRESENTED.....	2
INTRODUCTION	2
STATEMENT OF FACTS.....	3
I. Early Life.....	3
II. Instant Offense	4
III. Motion to Dismiss	5
IV. Plea and Sentencing.....	6
ARGUMENT	8
POINT I	8
The indictment against Mr. Balogh for illegally possessing a firearm without a license is unconstitutional in light of <i>New York State Rifle & Pistol Ass’n v. Bruen</i> , 597 U.S. 1 (2022). Thus, Mr. Balogh’s weapon-possession indictment must be dismissed.	8
A. The State cannot punish an individual for failing to comply with an unconstitutional licensing standard, that is, the proper-cause standard.	8
B. It is constitutionally irrelevant that Mr. Balogh did not try to satisfy the unconstitutional proper-cause standard by applying for a license.....	10
C. This indictment is directly traceable to the unconstitutional proper-cause requirement.	14
D. The purported appeal waiver does not bar Mr. Balogh’s constitutional claim.	15
POINT II	16
Mr. Balogh’s sentence of five years’ probation is excessive and should be reduced because the gun at issue was neither used nor displayed, Mr. Balogh has no prior arrests or convictions, and he has strong family support and work history.....	16

POINT III.....	22
The purported appeal waiver is invalid because Mr. Balogh did not have a fair opportunity to reject the waiver, and he was not adequately apprised of his appellate rights.	22
POINT IV	26
Multiple probation conditions must be struck due to their lack of connection with Mr. Balogh’s rehabilitation, their unconstitutionality, or their conflict with statute. 26	
A. Many of the probation conditions are unrelated to Mr. Balogh’s case and not tailored to his rehabilitation.	27
B. Conditions 7 and 24 are unconstitutionally vague and overbroad and infringe on Mr. Balogh’s First Amendment association rights.	30
C. Condition 10 conflicts with C.P.L. § 420.35(1).	35
CONCLUSION	36
STATEMENT PURSUANT TO RULE 5531	1-A
PRINTING SPECIFICATIONS STATEMENT	2-A
AFFIRMATION OF SERVICE OF BRIEF ON CLIENT.....	3-A
AFFIRMATION OF SERVICE OF BRIEF ON DISTRICT ATTORNEY	4-A
NOTICE OF CONSTITUTIONAL CHALLENGE	5-A
AFFIRMATION OF SERVICE UPON THE ATTORNEY GENERAL.....	6-A

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Concepcion v. United States</i> , 597 U.S. 481 (2022)	18
<i>Allen v. Wright</i> , 468 U.S. 737 (1984)	11, 12
<i>Antonyuk v. Chiumento</i> , 89 F.4th 271 (2d Cir. 2023)	14
<i>Atkinson v. Garland</i> , 70 F.4th 1018 (7th Cir. 2023)	15
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972)	30, 34
<i>Jackson-Bey v. Hanslmaier</i> , 115 F.3d 1091 (2d Cir. 1997)	12
<i>Jones v. City of Opelika</i> , 316 U.S. 584 (1942) (Stone, J., dissenting), <i>adopted per curiam on rehearing</i> , 319 U.S. 103 (1943)	11
<i>LoFranco v. U.S. Parole Comm’n</i> , 986 F. Supp. 796 (S.D.N.Y. 1997)	29, 33
<i>Lovell v. City of Griffin</i> , 303 U.S. 444 (1939)	5, 11
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	14
<i>Marbury v. Madison</i> , 1 Cranch 137 (1803)	13
<i>Midwest Media Prop., L.L.C. v. Symmes Twp., Ohio</i> , 503 F.3d 456 (6th Cir. 2007)	15
<i>Montejo v. Louisiana</i> , 556 U.S. 778 (2009)	15
<i>Moore v. Harper</i> , 600 U.S. 1 (2023)	13
<i>Moose Lodge No. 107 v. Irvis</i> , 407 U.S. 163 (1972)	11, 12
<i>New York State Rifle & Pistol Ass’n v. Bruen</i> , 597 U.S. 1 (2022)	passim
<i>Obergefell v. Hodges</i> , 576 U.S. 644 (2015)	9
<i>Shuttlesworth v. City of Birmingham</i> , 394 U.S. 147 (1969)	passim
<i>Smith v. Caboon</i> , 283 U.S. 553 (1931)	5, 11, 12
<i>Staub v. City of Baxley</i> , 355 U.S. 313 (1958)	5, 6, 11, 12
<i>U.S. v. Cabot</i> , 325 F.3d 384 (2d Cir. 2003)	30

<i>United States v. Birkedahl</i> , 973 F.3d 49 (2d Cir. 2020)	34
<i>United States v. Bolin</i> , 976 F.3d 202 (2020)	31
<i>United States v. Carlineo</i> , 998 F.3d 533 (2d Cir. 2021)	31, 34
<i>United States v. Decastro</i> , 682 F.3d 160 (2d Cir. 2012)	12
<i>United States v. Green</i> , 618 F.3d 120 (2d Cir. 2010)	31, 32
<i>United States v. Kunz</i> , 68 F.4th 748 (2d Cir. 2023).....	30
<i>United States v. MacMillen</i> , 544 F.3d 71 (2d Cir. 2008).....	32
<i>United States v. Matta</i> , 777 F.3d 116 (2015).....	31, 34
<i>United States v. Miselis</i> , 972 F.3d 518 (4th Cir. 2020)	14
<i>United States v. Reeves</i> , 591 F.3d 77 (2d Cir. 2010).....	31, 34
<i>United States v. Simmons</i> , 343 F.3d 72 (2d Cir. 2003).....	30
<i>United States v. Sims</i> , 92 F.4th 115 (2d Cir. 2024).....	27
<i>United States v. Washington</i> , 893 F.3d 1076 (8th Cir. 2018)	33

CASES

<i>In re K.M.</i> , 117 N.E.3d 347 (Ill.App. 1st Dist. 2018).....	33
<i>Jones v. State</i> , 41 P.3d 1247 (Wyo. 2022)	34
<i>People v. Alvarez</i> , 233 A.D.3d 619 (1st Dep’t 2024).....	27
<i>People v. Amorosi</i> , 96 N.Y.2d 180 (2001).....	36
<i>People v. Arias</i> , 210 A.D.3d 593 (1st Dep’t 2022)	27, 36
<i>People v. Benjamin</i> , 216 A.D.3d 1457 (4th Dep’t 2023)	15
<i>People v. Bisono</i> , 36 N.Y.3d 1013 (2020).....	23, 24
<i>People v. Bonilla</i> , 211 A.D.3d 614 (1st Dep’t 2022)	25
<i>People v. Bouton</i> , 107 A.D.3d 1035 (3d Dep’t 2013).....	25

<i>People v. Boyd</i> , 175 A.D.3d 1030 (4th Dep’t 2019)	19
<i>People v. Bradshaw</i> , 18 N.Y.3d 257 (2011)	22
<i>People v. Bradshaw</i> , 76 A.D.3d 566 (2d Dep’t 2010)	25
<i>People v. Brenner</i> , 193 A.D.3d 875 (2d Dep’t 2021)	25
<i>People v. Brisman</i> , 2025 Slip Op. 00123 (2025)	17
<i>People v. Bruce L.</i> , 44 A.D.3d 688 (2d Dep’t 2007)	19
<i>People v. Cabrera</i> , 41 N.Y.3d 35 (2023)	10
<i>People v. Carolyn S.</i> , 92 Misc. 2d 674 (Mt. Vernon City Ct. 1977)	18
<i>People v. Cruz</i> , 168 A.D.3d 461 (1st Dep’t 2019)	18
<i>People v. Delgado</i> , 80 N.Y.2d 780 (1992)	17
<i>People v. Dewberry</i> , 223 A.D.2d 555 (2d Dep’t 1996)	25
<i>People v. Dranchuk</i> , 203 A.D.3d 741 (2d Dep’t 2022)	36
<i>People v. Ellis</i> , 194 A.D.3d 428 (1st Dep’t 2021)	24
<i>People v. Farrar</i> , 52 N.Y.2d 302 (1981)	17
<i>People v. Flores</i> , 134 A.D.3d 425 (1st Dep’t 2015)	25
<i>People v. French</i> , 72 A.D.3d 1397 (3d Dep’t 2010)	35
<i>People v. Fruster</i> , 225 A.D.3d 1275 (4th Dep’t 2024)	15
<i>People v. Garcia</i> , 41 N.Y.3d 62 (2023)	10, 11, 12
<i>People v. Goins</i> , 177 A.D.3d 769 (2d Dep’t 2019)	23
<i>People v. Hakes</i> , 32 N.Y.3d 624, 632 (2018)	36
<i>People v. Hall</i> , 228 A.D.3d 466 (1st Dep’t 2024)	27
<i>People v. Harlee</i> , 187 A.D.3d 1586 (4th Dep’t 2020)	25
<i>People v. Haughton</i> , 229 A.D.3d 467 (2d Dep’t 2024)	23, 25, 26

<i>People v. Haynes</i> , 100 A.D.2d 832 (1st Dep’t 1984).....	19
<i>People v. Hughes</i> , 22 N.Y.3d 44 (2013).....	8
<i>People v. Jimenez</i> , 138 Misc.2d 867 (Bronx Co. Crim. Ct. 1988).....	21
<i>People v. Johnson</i> , 225 A.D.3d 453 (1st Dep’t 2024), <i>lv. granted</i> , 42 N.Y.3d 939 (2024)	16
<i>People v. Kemp</i> , 94 N.Y.2d 831 (1999)	22
<i>People v. Khuong Dinh Pham</i> , 31 A.D.3d 962 (3d Dep’t 2006)	19
<i>People v. Letterlough</i> , 86 N.Y.2d 259 (1995)	27
<i>People v. Lopez</i> , 6 N.Y.3d 248, 255 (2006)	15, 22
<i>People v. Marcelle</i> , 222 A.D.3d 883 (2d Dep’t 2023)	23
<i>People v. Marrero</i> , 219 A.D.2d 518 (1st Dep’t 1995).....	20
<i>People v. McPherson</i> , 135 A.D.3d 446 (1st Dep’t 2016)	18
<i>People v. Mena</i> , 173 A.D.3d 1217 (2d Dep’t 2019)	23
<i>People v. Mosqueda</i> , 97 Cal. App. 5th 399 (Cal. App. 2023).....	12
<i>People v. Moyett</i> , 7 N.Y.3d 892 (2006)	24
<i>People v. Nixon</i> , 222 A.D.3d 1384 (4th Dep’t 2023)	15
<i>People v. Notey</i> , 72 A.D.2d 279 (2d Dep’t 1980)	17
<i>People v. O’Neil</i> , 165 Cal. App. 4th 1351 (1st Dist. 2008).....	34
<i>People v. Oquendo</i> , 105 A.D.3d 447 (1st Dep’t 2013)	25
<i>People v. Pagan</i> , 159 A.D.2d 6 (1st Dep’t 1990).....	20
<i>People v. Payton</i> , 51 N.Y.2d 169 (1980).....	15
<i>People v. Percy</i> , 2025 Slip Op. 00406 (1st Dep’t 2025)	28, 36
<i>People v. Prude</i> , 166 A.D.3d 411 (1st Dep’t 2018)	18
<i>People v. Rivera</i> , 193 A.D.3d 766 (2d Dep’t 2021)	25

<i>People v. Rodriguez</i> , 136 A.D.2d 509 (1st Dep’t 1988).....	20
<i>People v. Rodriguez</i> , 165 A.D.3d 426 (1st Dep’t 2018).....	18
<i>People v. Rouse</i> , 225 A.D.3d 1120 (4th Dep’t 2024)	15
<i>People v. Salas</i> , 220 A.D.3d 545 (1st Dep’t 2023).....	18
<i>People v. Saraceni</i> , 153 A.D.3d 1559 (4th Dep’t 2017)	28
<i>People v. Seaberg</i> , 74 N.Y.2d 1 (1989).....	23
<i>People v. Selby</i> , 210 A.D.3d 1015, 1016 (2d Dep’t 2022).....	30
<i>People v. Sorge</i> , 96 Misc.2d 922 (Sup. Ct. Bronx Cty 1978)	31
<i>People v. Spruill</i> , 200 A.D.3d 475 (1st Dep’t 2021).....	18
<i>People v. Sutton</i> , 184 A.D.3d 236 (2d Dep’t 2020).....	23
<i>People v. Thomas</i> , 112 A.D.3d 999 (3d Dep’t 2013).....	20
<i>People v. Thomas</i> , 34 N.Y.3d 545 (2019).....	23, 24
<i>People v. Thompson</i> , 189 A.D.3d 1969 (3d Dep’t 2020).....	35
<i>People v. Thompson</i> , 219 A.D.3d 1666 (4th Dep’t 2023).....	24
<i>People v. Torres</i> , 229 A.D.3d 469 (2d Dep’t 2024)	23
<i>People v. Tucker</i> , 302 A.D.2d 752 (3d Dep’t 2003)	31
<i>People v. Watt</i> , 189 A.D.3d 637 (1st Dep’t 2020)	17
<i>People v. Weir</i> , 174 A.D.3d 1465 (4th Dep’t 2019).....	23
<i>People v. West</i> , 283 A.D.2d 721 (3d Dep’t 2001)	35
<i>People v. Wiggins</i> , 24 A.D.3d 263 (1st Dep’t 2005)	17
<i>People v. Williams</i> , 219 A.D.3d 409 (1st Dep’t 2023)	17
<i>State v. Villano</i> , 166 Wash App. 142 (WA App. Div 3, 2012)	33
<i>State v. Weatherwax</i> , 193 Wash. App. 667, 678 (WA App. Div 3, 2016), rev’d on other grounds 188 Wash.2d 139 (WA 2017).....	33

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. I.....	30, 35
U.S. Const. Amend. V	22, 30, 35
U.S. Const. Amend. XIV	22, 30, 35

STATUTES

Former Penal Law § 400.00(1)	16
Former Penal Law § 400.00(2)	10
Penal Law § 110	1
Penal Law § 400.00(1)	16
Penal Law § 65.00(3)	19
Penal Law § 65.05(1)	19
Penal Law § 65.10(1)	32, 33, 34
Penal Law § 65.10(2)	43
Penal Law § 65.20(1)	19
Penal Law § 265.03(3)	1
Penal Law § 265.20 (a)	9
Penal Law § 265.20(a)	9

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

-----X
THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- :

MATA BALOGH, :

Defendant-Appellant. :
-----X

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction rendered June 21, 2023, by the Supreme Court, Bronx County, convicting appellant, upon a guilty plea, of one count of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110, 265.03(3)), and sentencing him to a term of five years' probation (Lorenzo, J., at plea and sentence).

Notice of appeal was timely filed, and on August 31, 2023, this Court granted appellant leave to appeal as a poor person and assigned Jenay Nurse Guilford, Center for Appellate Litigation, as counsel.

Appellant had no codefendants below. No application for a stay of execution of judgment has been made. Appellant is presently serving his term of probation.

QUESTIONS PRESENTED

1. Whether the indictment against Mr. Balogh—charging that he illegally possessed a gun for which he did not have a license—is unconstitutional, in light of *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022)?
2. Whether Mr. Balogh’s sentence should be reduced in the interest of justice, where he neither used nor displayed the gun at issue, has no prior arrests or convictions, and has strong family support and employment history?
3. Whether the purported appeal waiver is invalid because Mr. Balogh did not have a fair opportunity to reject the waiver and was not adequately apprised of his appellate rights?
4. Whether multiple probation conditions must be struck due to their lack of connection with Mr. Balogh’s rehabilitation, their unconstitutionality, or their conflict with statute?

INTRODUCTION

Mata Balogh was born in Mississippi. When he was eight years old, his parents divorced, and Mr. Balogh found himself without a steady caretaker. His mother, who had mental health issues, could not care for him; they were both homeless until Mr. Balogh was taken in by his father, who was working as a truck driver. Mr. Balogh and his father eventually moved to New York when he was 13 years old. Mr. Balogh maintains a close relationship with his father, who has supported him through adolescence and young adulthood.

Mr. Balogh received his high school diploma. In New York, he maintained consistent employment, working as an autobody shop cleaner and cashier at a bodega

before becoming a building superintendent in 2022, a job he has worked ever since. The instant case was his first arrest.

Fearing for his safety while traveling in the Bronx, Mr. Balogh acquired a gun for protection. One evening, while exiting a building, he was ambushed by NYPD officers in an unmarked car. Mr. Balogh immediately complied and put his hands in the air. The officers searched Mr. Balogh and found a gun in his pants pocket. He forthrightly acknowledged the weapon was his and informed the officers that he carried it for self-defense purposes. As argued in Point I, this Court should dismiss Mr. Balogh's weapon-possession indictment as violative of the Second Amendment.

Mr. Balogh ultimately pled guilty to attempted second-degree criminal possession of a weapon and was sentenced to a term of five-years' probation, the maximum probationary sentence. This sentence was excessive and should be reduced in the interest of justice as argued in Point II. Additionally, as argued in Point IV, many of the probation conditions imposed on Mr. Balogh violate the law and should be struck.

STATEMENT OF FACTS

I. Early Life

Mr. Balogh was born in Mississippi (PSI 4). His parents divorced when he was young (*id.*). Following his parents' divorce, Mr. Balogh was raised by his mother, who struggled with mental illness (*id.*). Although Mr. Balogh was later taken in by his father, he was homeless from the age of eight until 13 (*id.*). In 2011, when he was 13 years old, Mr. Balogh moved with his father to New York City (*id.*). Mr. Balogh has been living

with his father in a one-bedroom apartment in Washington Heights since 2016 and continues to have a strong relationship with him (*id.*).

Mr. Balogh graduated from New Jersey Job Corp. and received his high school diploma in June 2018 (*id.*). He has been employed as a building superintendent since January 2022 (*id.*). Prior to that, he worked in Queens as a cleaner at an autobody shop and a cashier at a bodega (*id.*). In addition, Mr. Balogh is skilled with computers, loves to read, and taught himself four languages (*id.*). He hopes to start his own business and receive HVAC and building maintenance training (*id.*).

II. Instant Offense

On August 1, 2022, around 10:19 PM, Mr. Balogh was exiting a building in the Bronx when two NYPD officers jumped out of an unmarked vehicle and approached Mr. Balogh, having seen the shape of a gun in his pants pocket as they drove by (Complaint; Voluntary Disclosure Form (VDF) 1; Omnibus Motion 3). Mr. Balogh instantly put his hands in the air, and the officers searched him (Omnibus Motion 3). The officers found a firearm in Mr. Balogh's pant pocket (*id.* at 4). Mr. Balogh told the officers, "I'm just trying to protect myself," later explaining that he only carried a weapon when travelling through the Bronx where he was concerned about robberies (Complaint 2; VDF 1-2; PSI 3).

Mr. Balogh did not display the firearm, did not use the firearm, nor did he intend to use the firearm unlawfully (Omnibus Motion 5). Mr. Balogh has no criminal record; he had never even been arrested prior to the instant offense (RAP Sheet; PSI 3). His

father was “shocked” to learn about his son’s aberrational and unthoughtful decision (PSI 4). He suggested to the Probation Department that Mr. Balogh, who likely suffers from anxiety, may have been concerned for his safety because they don’t live in the “best area” (*id.* at 4-5).

III. Motion to Dismiss

The defense moved to dismiss Mr. Balogh’s indictment for criminal possession of a weapon pursuant to the United States Supreme Court’s decision in *New York State Rifle & Pistol Assn v. Bruen*, 597 U.S. 1 (2022), where the Court found that New York’s “proper cause” requirement for gun licensure unconstitutionally interferes with citizens’ Second Amendment rights (Omnibus Motion 5, 12).¹ Although Mr. Balogh had not applied for a license, the motion argued that the Constitution does not require Mr. Balogh to first obtain a license under an unconstitutional licensing scheme, citing previous Supreme Court cases, *Smith v. Caboon*, 283 U.S. 553 (1931), *Lovell v. City of Griffin*, 303 U.S. 444 (1939), and *Staub v. City of Baxley*, 355 U.S. 313 (1958), and maintaining that *Bruen* held that the rights bestowed by the Second Amendment should be treated no differently from those protected by any other amendment, including the First Amendment (*id.* at 12-13 (citing *Bruen*, 597 U.S. at 62)). The defense further asserted that the “proper cause” requirement made it impossible for Mr. Balogh to obtain a license to carry a firearm because, although he possessed a firearm for self-

¹ The defense also argued that the gun and Mr. Balogh’s statements should be suppressed because the police stopped and frisked Mr. Balogh unlawfully (Omnibus Motion 4, 15-16, 19-20).

defense reasons, he was unable to distinguish his interest in self-defense from that of the general community (*id.* at 14).

The prosecution opposed the motion, arguing that Mr. Balogh lacked standing to challenge the constitutionality of New York’s gun laws and that *Bruen* does not prohibit New York from continuing to require that a person obtain a permit to carry a handgun in public, even though it cannot require the applicant show a “special need” to carry a firearm for self-defense (Affirmation in Opposition 16). As part of its standing argument, the prosecution rejected the applicability of two of the Supreme Court’s main cases on the issue: *Staub*, 355 U.S. 313, and *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (*id.* at 17-19).

The lower court upheld the indictment, concluding that New York’s licensing scheme without the proper-cause requirement was constitutional and that Mr. Balogh, in any case, lacked standing to challenge it without having attempted to obtain a license first (Decision and Order 1-4).

IV. Plea and Sentencing

Mr. Balogh pled guilty to attempted criminal possession of a weapon in the second degree (P 10).² During the plea, after Mr. Balogh had already admitted guilt to the charged crime, the court told Mr. Balogh that he was “also waiving [his] right to appeal” (*id.* at 5-7). The court correctly informed Mr. Balogh that “an appeal is a

² “P” refers to May 5, 2023 plea minutes. “S” refers to June 21, 2023 sentencing minutes.

proceeding before a higher court” and that if he “could not afford the costs of a lawyer, the state would pay them. On appeal [he] could argue normally through [his] lawyer that an error took place in this Court requiring reversal or modification of the conviction” (*id.* at 7), but the court did not mention that Mr. Balogh retained this right to appellate counsel following a waiver of his right to appeal. While the court asked Mr. Balogh if he had spoken with his attorney about waiving his right to appeal (*id.* at 8), it did not ask Mr. Balogh whether he had read and understood the waiver. Indeed, Mr. Balogh was asked to sign the waiver before the court explained what it was (*id.* at 4, 8).

Mr. Balogh was sentenced to five years’ probation (S 2). The court file includes a copy of the Conditions of Probation. Nearly every possible condition of probation listed is checked-off as requiring Mr. Balogh’s compliance. These conditions include the following:

- “Avoid injurious or vicious habits; refrain from frequenting unlawful or disreputable places; and do not consort with disreputable people” (Condition 7);
- “Pay the mandatory surcharge, [various fees], and any other fee or surcharge imposed, as directed by the court” (Condition 10);
- “Submit to any assessments and/or tests to determine the presence of alcohol or illegal substances, if directed by the Department of Probation” (Condition 15);
- “Participate in an alcohol, substance abuse, intervention, domestic violence or alternative to violence program as directed by the Department of Probation, and sign a waiver of confidentiality allowing the Court and the

Department of Probation to communicate with the treatment provider and have access to the treatment provider's records" (Condition 23); and

- "Refrain from wearing or displaying gang paraphernalia and having any association with a gang or members of a gang if directed by the Department of Probation" (Condition 24).

(Conditions of Probation, dated June 21, 2023, at 2).

Mr. Balogh's signature appears on the form along with a stamped facsimile of the judge's signature.

ARGUMENT

POINT I

The indictment against Mr. Balogh for illegally possessing a firearm without a license is unconstitutional in light of *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). Thus, Mr. Balogh's weapon-possession indictment must be dismissed.

A. The State cannot punish an individual for failing to comply with an unconstitutional licensing standard, that is, the proper-cause standard.

Mr. Balogh was convicted of attempted second-degree criminal possession of a weapon for having a loaded firearm without a license. New York law only criminalizes the public possession of a firearm if it is *unlicensed*. Penal Law § 265.20 (a)(3); *People v. Hughes*, 22 N.Y.3d 44, 50 (2013). A license confers immunity, and thus a complete defense, to a weapon-possession charge. Penal Law § 265.20(a)(3).

New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022) held that, although the State can impose licensing restrictions, the Second Amendment limits its

power to do so. To establish that a licensing requirement satisfies the Second Amendment, the State bears the burden of proving that the requirement “is consistent with this Nation’s historical tradition of firearm regulation.” *Bruen*, 597 U.S. at 34.

Applying that test, the Supreme Court categorically invalidated New York’s former statutory requirement that, to obtain the license necessary to gain immunity, the individual must prove “proper cause” to publicly carry. *Id.* at 34-70; Former Penal Law § 400.00(2)(f).

Since satisfying that unconstitutional licensing requirement was Mr. Balogh’s only path to immunity from criminal prosecution, the conviction is unconstitutional. As the Supreme Court has repeatedly held, the State cannot punish an individual for failing to submit to its unconstitutional licensing/permitting standard. *See, e.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969). The State cannot convict someone for failing to try to satisfy an unconstitutional firearms-licensing standard (“proper cause”) any more than it can convict for failing to submit to an unconstitutional marriage-license standard (“good cause to wed”) or an unconstitutional professional-licensing requirement. *See generally Obergefell v. Hodges*, 576 U.S. 644 (2015). Therefore, Mr. Balogh’s criminal possession of a weapon indictment must be dismissed.

B. It is constitutionally irrelevant that Mr. Balogh did not try to satisfy the unconstitutional proper-cause standard by applying for a license.

Contrary to the lower court's holding, Mr. Balogh has standing even though he did not apply for a license and seek to satisfy the unconstitutional proper cause standard. An individual need not attempt to satisfy an unconstitutional licensing standard to preserve their standing to challenge that standard as a defense to a charge of unlicensed conduct. *Shuttlesworth*, 394 U.S. at 151.

Judge Rivera's dissenting opinion in *People v. Garcia*, 41 N.Y.3d 62 (2023) confirms the point. In *Garcia*, *Cabrera*, and *Pastrana*, the Court of Appeals addressed a variety of *Bruen* claims and rejected them as unpreserved. *E.g.*, *People v. Cabrera*, 41 N.Y.3d 35, 45-51 (2023). However, the Court took no position on standing, although this was another threshold issue the prosecution had pressed. *Id.* at 51 ("We take no position on whether Cabrera would have had standing to bring his *Bruen* claims had he timely raised them, or on the merits of the various *Bruen* claims addressed in the dissent to *People v. Garcia* (decided today)."). But Judge Rivera, whose dissent in *Garcia* rejected a preservation bar, expressly rejected the prosecution's standing argument too, finding that it conflicted with Supreme Court caselaw: "The United States Supreme Court has consistently held that a defendant has standing to challenge the constitutionality of a licensing scheme that underlies their criminal prosecution, even if the defendant did not apply for the license." *Garcia*, 41 N.Y.3d at 74 (citing *Shuttlesworth*, 394 U.S. at 151) ("[T]he defendant, convicted under a statute that criminalized participating in public

parades or demonstrations without a permit, had standing to challenge law even though he did not apply for permit.”), *Staub v. City of Baxley*, 355 U.S. 313, 319 (1958), *Smith v. Caboon*, 283 U.S. 553, 562 (1931), and *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938)).

Judge Rivera was right. The Supreme Court has “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. ‘The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands.’” *Staub*, 355 U.S. at 319 (citing *Smith*, 283 U.S. at 562 and *Lovell*, 303 U.S. at 452, quoting *Jones v. City of Opelika*, 316 U.S. 584, 602 (1942) (Stone, J., dissenting), *adopted per curiam on rehearing*, 319 U.S. 103, 104 (1943)).

Nor are civil-injunction-standing cases applicable, as Judge Rivera also acknowledged in dissent. *Garvia*, 41 N.Y.3d at 74 (Rivera, J., dissenting). A civil litigant must first “yield”—that is, subject themselves to the putative unconstitutional policy—because, absent an actual denial of a claimed benefit, the challenger has sustained no injury. *Allen v. Wright*, 468 U.S. 737, 746 (1984) (plaintiff parents could not challenge state’s educational system as discriminatory absent a showing that their children had been denied opportunities); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-68 (1972)

(plaintiff lacked standing to challenge discriminatory club-membership policy because plaintiff had not sought membership).³

The situation is markedly different where the defendant is asserting the constitutional challenge as a defense to a criminal prosecution. Where a person is criminally charged with violating an unconstitutional licensing standard, as here, the criminal charge/conviction alone confers standing to challenge the licensing standard. *See Smith*, 283 U.S. at 562 (“appellant has been arrested and held for trial” and was in “jeopardy”; he therefore had “standing” to challenge the unconstitutional transportation-certificate standard on equal-protection and due-process grounds); *Staub*, 355 U.S. at 319; *see also People v. Mosqueda*, 97 Cal. App. 5th 399, 405 (Cal. App. 2023) (unpublished section of the opinion). The Supreme Court’s criminal cases—*Shuttlesworth*, *Smith*, and *Staub*—are all in accord as they all found standing on that precise basis. *Garcia*, 41 N.Y.3d at 74 (Rivera, J., dissenting).

Nor is the *Shuttlesworth/Smith/Staub* doctrine confined to the First Amendment context. In *Smith*, which held that a defendant can challenge a transportation-licensing

³ The Second Circuit’s conclusory analysis in *United States v. Decastro* ignored the difference between standing in a civil case and standing in a criminal case. 682 F.3d 160 (2d Cir. 2012). Citing only civil cases, and making no reference to *Shuttlesworth*, *Smith*, or *Staub*, the Second Circuit held that “because Decastro failed to apply for a gun license in New York, he lacks standing to challenge the licensing laws of the State. ‘As a general matter, to establish standing to challenge an allegedly unconstitutional policy, a plaintiff must submit to [it].’” 682 F.3d at 164 (quoting *Jackson-Bey v. Hanslmaier*, 115 F.3d 1091, 1096 (2d Cir. 1997) (civil-injunction case) and citing *Allen*, 468 U.S. at 746, and *Moose Lodge*, 407 U.S. at 166-68). The Second Circuit did not discuss, and ultimately overlooked, *Shuttlesworth*, *Smith*, and *Staub*, likely because the parties did not cite them to the Court. *See Decastro’s Second Circuit Briefs* at 2010 WL 5809079 and 2011 WL 2530868.

standard without first applying for one, the Supreme Court held that defendant had standing to challenge the licensing law on due-process and equal-protection grounds (not First Amendment grounds). *Smith*, 283 U.S. at 557-68.

More fundamentally, *Bruen* itself rejected the State’s suggestion that we can dole out constitutional protections by ranking rights on a subjective hierarchy: “[T]he constitutional right to bear arms in public for self-defense is not a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.” *Bruen*, 597 U.S. at 70 (internal quotation marks omitted).

Finally, the *Shuttlesworth/Smith/Staub* doctrine applies regardless of whether every nook and cranny of a state-regulatory scheme is unconstitutional. The simple answer to this quantity-based formalism is that the *number* of constitutional violations in a statutory scheme does not matter. Where just one provision conditions access to a legal defense on compliance with an unconstitutional standard (proper-cause)—it is unconstitutional to prosecute someone for failing to comply with that “void” law. *Moore v. Harper*, 600 U.S. 1, 19-20 (2023) (“an act of the legislature, repugnant to the constitution, is void”) (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

The Supreme Court’s cases refute such illogical formalism too. *Shuttlesworth*, for example, did not invalidate Birmingham’s parade-permit requirement that a “written application” be made or that the applicant describe “the probable number of persons [involved].” *Shuttlesworth*, 394 U.S. at 149-150. And yet the defendant there prevailed because just one provision of the Birmingham licensing law was unconstitutional—the

provision conferring discretion upon local government officials to deny a license for a speech or a parade. *Id.* at 150-51.

C. This indictment is directly traceable to the unconstitutional proper-cause requirement.

The proper-cause standard taints the weapon-possession indictment. The record fails to show that any lawful⁴ restrictions could have barred Mr. Balogh from obtaining a license such that he would have been denied a license regardless of the proper-cause standard. It is undisputed that Mr. Balogh had no prior criminal convictions and that he was over the age of 21. Penal Law § 400.00(1)(a), (1)(c). Thus, no other lawful⁵ licensing provisions break the causal link between the unconstitutional “proper cause” requirement and this indictment. *See generally Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (injury must be “fairly traceable to the challenged action of the defendant” and a favorable legal decision must actually redress the injury) (ellipsis and quotation marks omitted); *United States v. Miselis*, 972 F.3d 518, 547 (4th Cir. 2020)

⁴ Former Penal Law § 400.00(1)’s unconstitutional eligibility requirements cannot defeat Mr. Balogh’s claim. The “good moral character” provision of Former Penal Law § 400.00(1)(b) patently offends the Second Amendment, lacking any historic tradition and affording the same unchanneled discretion to licensing officials to disarm citizens as did “proper cause.” *See Antonyuk v. Chiumento*, 89 F.4th 271, 312-28 (2d Cir. 2023) (denying a preliminary injunction of the enforcement of the *newly enacted* “good moral character” provision which, unlike the provision in effect in 2015, specifically defines “good moral character” to focus on dangerousness; holding that the Second Amendment permits statutory requirements that focus on whether the “applicant, if permitted to wield a lethal weapon, would pose a danger to himself, others, or to public safety”); *id.* at 312 (“Licensing that includes discretion that is *bounded by defined standards*, we conclude, is part of this nation’s history and tradition of firearm regulation and therefore in compliance with the Second Amendment.”) (emphasis added).

⁵ Also clearly unconstitutional are, among other provisions, Former Section 400.00(1)(n), which required a showing that “no good cause” existed to justify denial. That subjective and arbitrary limitation upon the Second Amendment right has no historical tradition backing it up.

(conviction upheld because record “establishes conclusively that the defendants’ [] conduct falls under the statute’s surviving purposes”); *Midwest Media Prop., L.L.C. v. Symmes Twp., Ohio*, 503 F.3d 456, 462 (6th Cir. 2007).

Should the Court nonetheless find factual development necessary to determine whether the indictment is traceable to the proper cause challenge—that is, whether there would have been other constitutional bases to deny the license—a remand for a hearing, not affirmance, is the fair and appropriate remedy. *See Montejo v. Louisiana*, 556 U.S. 778, 798 (2009) (where new rule “changed the legal landscape,” remittal was appropriate); *People v. Payton*, 51 N.Y.2d 169, 177-78 (1980) (finding, on remand from Supreme Court’s decision in *Payton*, that remittal was appropriate to permit People to justify warrantless home entry on ground of exigent circumstances, such proof “now, and for the first time” being “relevant and necessary to the People’s case”); *see also Atkinson v. Garland*, 70 F.4th 1018, 1020 (7th Cir. 2023).

D. The purported appeal waiver does not bar Mr. Balogh’s constitutional claim.

Mr. Balogh respectfully submits that an appeal waiver does not waive a Second Amendment *Bruen*-based claim as it is an issue of constitutional dimension that goes to the very heart of the criminal process. *People v. Benjamin*, 216 A.D.3d 1457, 1457 (4th Dep’t 2023) (citing *People v. Lopez*, 6 N.Y.3d 248, 255 (2006)); *see also People v. Fruster*, 225 A.D.3d 1275, 1276 (4th Dep’t 2024); *People v. Rouse*, 225 A.D.3d 1120, 1121 (4th Dep’t 2024); *People v. Nixon*, 222 A.D.3d 1384, 1385 (4th Dep’t 2023).

Mr. Balogh recognizes that in *People v. Johnson*, 225 A.D.3d 453, 453-54 (1st Dep't 2024), *lv. granted*, 42 N.Y.3d 939 (2024), this Court rejected the Fourth Department's *Benjamin* analysis, but notes that the Court of Appeals has granted leave to review the *Johnson* decision. In the alternative, for the reasons explained in Point III of this brief, the purported appeal waiver in this case is invalid.

POINT II

Mr. Balogh's sentence of five years' probation is excessive and should be reduced because the gun at issue was neither used nor displayed, Mr. Balogh has no prior arrests or convictions, and he has strong family support and work history.

Mr. Balogh's sentence of five years' probation, a sentence greater than the minimum sentence required by law, is excessive and a reduction is warranted. This offense involved no actual violence. Mr. Balogh had no prior interaction with the criminal system. Additionally, he has strong family support and a solid work history that further demonstrate that the burdensome requirements of a five-year probationary term are especially unnecessary. Mr. Balogh was eligible for an unconditional discharge, a three-year conditional discharge, or a reduced term of probation. Penal Law §§ 65.00(3)(a)(i), 65.05(1), 65.20(1). Reducing Mr. Balogh's sentence to the minimum here would serve both society's and Mr. Balogh's interests and be the fair result.

In seeking a modification of his sentence, Mr. Balogh does not contend that the lower court committed error. Such a finding is not required for this Court to modify a sentence in the interest of justice. This Court has unique interest of justice jurisdiction

that it may invoke when it finds a sentence to be excessive or otherwise unfair. *People v. Delgado*, 80 N.Y.2d 780, 783 (1992) (“An intermediate appellate court has broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances, even though the sentence may be within the permissible statutory range”); *People v. Wiggins*, 24 A.D.3d 263, 263 (1st Dep’t 2005). “A defendant need not demonstrate extraordinary circumstances or abuse of discretion by the sentencing court in order to obtain a sentence reduction.” *People v. Brisman*, 2025 Slip Op. 00123, at 1 (2025). That Mr. Balogh’s sentence was the product of a negotiated plea in no way detracts from the merits of his claim. *See, e.g., People v. Williams*, 219 A.D.3d 409, 409 (1st Dep’t 2023); *People v. Watt*, 189 A.D.3d 637, 638 (1st Dep’t 2020).

The Court of Appeals has directed that, in determining whether a sentence is excessive, this Court should consider “the crime charged, the particular circumstances of the individual before the court, and the purpose of a penal sanction.” *People v. Farrar*, 52 N.Y.2d 302, 305 (1981). The objectives of punishment include not only deterrence, rehabilitation, retribution, and isolation, but also the “promotion of [the defendant’s] successful and productive reentry and reintegration into society.” Penal Law § 1.05(6). The sentencing court must be guided by the overriding principle that the minimum sentence should be imposed consistent with the public’s protection, the offense’s gravity, and the defendant’s rehabilitative needs. *See People v. Notey*, 72 A.D.2d 279, 282-83 (2d Dep’t 1980). The United States Supreme Court has recognized that

“[t]here is a longstanding tradition in American law, dating back to the dawn of the Republic, that a judge at sentencing considers the whole person before him or her ‘as an individual.’” *Concepcion v. United States*, 597 U.S. 481, 486 (2022).

It has been recognized that a sentence of probation “substantially curtails liberty.” *People v. Carolyn S.*, 92 Misc. 2d 674, 677 (Mt. Vernon City Ct. 1977). Accordingly, this Court frequently reduces terms of probation. *See, e.g., People v. Cruz*, 168 A.D.3d 461, 461 (1st Dep’t 2019); *People v. Prude*, 166 A.D.3d 411, 411 (1st Dep’t 2018); *People v. Rodriguez*, 165 A.D.3d 426, 426 (1st Dep’t 2018); *People v. McPherson*, 135 A.D.3d 446, 446 (1st Dep’t 2016). Here, Mr. Balogh has shown that he can be a responsible, law-abiding citizen. He has no prior criminal history and has maintained steady employment—he is capable of managing independently and is additionally bolstered by his family’s support. The level of supervision to which he will be subject during a five-year probationary term is simply unnecessary. A reduced sentence of unconditional or conditional discharge, or at the minimum, a three-year term of probation, would be more than sufficient to ensure that Mr. Balogh’s aberrant conduct remains precisely that.

Mr. Balogh has no prior felony offenses or even arrests. As courts throughout the state have recognized, this lack of prior criminal history is a mitigating factor that indicates a reduced sentence is appropriate. *See, e.g., People v. Salas*, 220 A.D.3d 545, 545 (1st Dep’t 2023) (lack of criminal history a factor in reducing sentence); *People v. Spruill*, 200 A.D.3d 475, 475-76 (1st Dep’t 2021) (same); *People v. Boyd*, 175 A.D.3d 1030, 1031

(4th Dep’t 2019) (sentence reduced for first-time felony offender); *People v. Bruce L.*, 44 A.D.3d 688 (2d Dep’t 2007) (sentence reduced given defendant’s “complete lack of any juvenile or criminal record”); *People v. Khuong Dinh Pham*, 31 A.D.3d 962, 967 (3d Dep’t 2006) (reducing sentence because defendant had lived a “productive and apparently respectable life” and had no prior criminal record); *People v. Haynes*, 100 A.D.2d 832, 833 (1st Dep’t 1984) (reducing sentence for defendant with no criminal record, gainful employment, and support of his family).

A review of the record makes clear that, if this Court were to reduce Mr. Balogh’s sentence, he would be buoyed by the support of his family, particularly his father, with whom he resides. Mr. Balogh’s father holds his son in high regard and, while shocked by the charges, appreciates that this aberrational offense was likely the result of them “not residing in the best area” (PSI 4). Social science research demonstrates that family support has “been shown to reduce the likelihood that an individual will return to criminal activity.”⁶ As his father recognized, aside from this offense, Mr. Balogh has lived a law abiding and productive life. He graduated from high school and worked odd jobs before finding stable employment as a building superintendent in January 2022 (PSI 4). Mr. Balogh continued working following this incident while out on his own recognizance. Appellate courts have frequently reduced sentences relying on evidence

⁶ The Urban Institute, *Families and Reentry: Unpacking How Social Support Matters*, at 5 (June 2012), <https://www.urban.org/sites/default/files/publication/24921/1001630-Families-and-Reentry-Unpacking-How-Social-Support-Matters.PDF>.

of such support and employment history. *See People v. Thomas*, 112 A.D.3d 999, 1001 (3d Dep’t 2013) (reducing sentence, in part, due to defendant’s employment and family support); *People v. Marrero*, 219 A.D.2d 518, 519 (1st Dep’t 1995) (employment history a factor in reducing sentence); *People v. Pagan*, 159 A.D.2d 6, 14 (1st Dep’t 1990) (reducing sentence in light of “close and supportive family ties”); *People v. Rodriguez*, 136 A.D.2d 509, 509 (1st Dep’t 1988) (considering defendant’s steady employment and family support in decision to reduce sentence). Additionally, Mr. Balogh has many admirable goals for his future, including starting his own business and completing HVAC and building maintenance training (PSI 4).

Under the unique circumstances of this case, these additional years of probation are simply a waste of state resources.⁷ Mr. Balogh has shown that he can live a law abiding life, but for five years, Mr. Balogh will be subject to the threat of incarceration if he commits even a technical violation of any of the conditions of his probation, many of which, as described in Point IV below, are illegal.⁸ According to a 2017 report by a former commissioner of the New York City Department of Probation, Michael P.

⁷ See Justice Center, the Council of State Governments, *Improving Probation and Alternatives to Incarceration in New York State: Increasing Public Safety & Reducing Spending on Prisons and Jails*, at 5 (Feb. 2013), https://csgjusticecenter.org/wp-content/uploads/2020/02/122112_Probation-ATI-Recs_BRIEF_for-NYSAC.pdf (“Most probationers who will be rearrested do so during the first six -12 months on supervision, limiting the value of the much longer supervision terms required by NY’s current statutes [compared to other states].”).

⁸ See N.Y.S. Div. of Crim. Just. Servs., *New York State Probation Population 2023 Profile*, at 12 (Aug. 2024), <https://www.criminaljustice.ny.gov/crimnet/ojsa/2023%20Probation%20Population%20Report.pdf> (noting that, in 2023, 17% of all probation violators were re-arrested for “technical violations”); Shaila Dewan, N.Y. Times, *Probation May Sound Light, but Punishments Can Land Hard* (Aug. 2, 2015), www.nytimes.com/2015/08/03/us/probation-sounding-light-can-land-hard.html (probation can “severely disrupt a working-class life”).

Jacobson, working with Harvard Kennedy’s Executive Session on Community Corrections, “probation agencies are so severely underfunded that they simply do not have the resources to respond to technical violations in a graduated or nuanced way.”⁹ In order to downsize probation while simultaneously decreasing incarceration and increasing public safety, Mr. Jacobson recommended that, “[f]or those who are sentenced to active probation, terms should be significantly shortened or, at a minimum, courts should have the option of a range instead of prescribed terms.”¹⁰ *See People v. Jimenez*, 138 Misc.2d 867, 875 (Bronx Co. Crim. Ct. 1988) (imposing conditional discharge, not probation, where such supervision would serve “no proper purpose” and be potentially deleterious to defendants’ futures).

Given Mr. Balogh’s family support, steadfast commitment to being gainfully employed, and that he has otherwise followed the law, the hardships of probation would provide no utility to society and actually would be counterproductive in this case. Mr. Balogh has already completed over a year and a half of his probationary sentence. A shorter sentence will allow Mr. Balogh to achieve his goals and more quickly become a fully productive member of society. Accordingly, this Court should exercise its interest of justice authority and reduce Mr. Balogh’s sentence to the minimum: an unconditional

⁹ Michael P. Jacobson, *et al.*, *Less is More: How Reducing Probation Populations Can Improve Outcomes*, at 6 (Aug. 2017) https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/less_is_more_final.pdf.

¹⁰ *Id.* at 11.

or conditional discharge. Alternatively, it should reduce his term of probation to the three-year minimum.

POINT III

The purported appeal waiver is invalid because Mr. Balogh did not have a fair opportunity to reject the waiver, and he was not adequately apprised of his appellate rights.

There are multiple fundamental errors in the procedure followed below regarding Mr. Balogh's waiver of his right to appeal. First, after he had already fully admitted guilt and signed the waiver form, Mr. Balogh was told that with his guilty plea he was "also waiving [his] right to appeal" (P 7). Additionally, when the court belatedly explained the appeal waiver, it failed to inform Mr. Balogh that he retained the right to appellate counsel. Finally, the court never asked Mr. Balogh if he understood the substance of the written waiver, and his unfamiliarity with his appellate rights is compounded by the fact that Mr. Balogh had no experience with the criminal system. For these reasons, the waiver cannot be considered knowing, intelligent, and voluntary. Accordingly, Mr. Balogh's claims are properly before this Court. *See* U.S. Const. amends. V, XIV; N.Y. Const. art. I, § 6; *People v. Lopez*, 6 N.Y.3d 248, 256 (2006).

While an accused may waive the right to appeal, *People v. Kemp*, 94 N.Y.2d 831, 833 (1999), such a waiver will only be upheld if the record demonstrates that it was knowing, intelligent, and voluntary, *People v. Bradshaw*, 18 N.Y.3d 257, 264 (2011) (citing *Lopez*, 6 N.Y.3d at 256). This standard requires that the accused have "a full appreciation of the [nature and] consequences" of such a waiver. *Id.* (quoting *People v. Seaberg*, 74

N.Y.2d 1, 11 (1989)); *see also* *People v. Bisono*, 36 N.Y.3d 1013, 1018 (2020) (citing *People v. Thomas*, 34 N.Y.3d 545, 565-66 (2019)). An accused's understanding is assessed by considering the totality of the circumstances under which the purported waiver was made. *Bisono*, 36 N.Y.3d at 1018; *Thomas*, 34 N.Y.3d at 559. Under the totality of the circumstances, Mr. Balogh's waiver of his right to appeal was not knowingly, intelligently, and voluntarily made because he was told he was waiving his right to appeal after admitting guilt and after he had already signed the written waiver, was not informed that he still retained the right to appellate counsel, and he lacked a criminal history that might have given him a greater understanding of his appellate rights and the role of any waiver.

Courts regularly find that appeal waivers are invalid when the waiver is introduced after the defendant has already admitted guilt. *See People v. Haughton*, 229 A.D.3d 467, 467-68 (2d Dep't 2024) (appeal waiver invalid because court did not discuss waiver until after defendant fully admitted guilt); *People v. Torres*, 229 A.D.3d 469, 469 (2d Dep't 2024) (same); *People v. Marville*, 222 A.D.3d 883, 883 (2d Dep't 2023) (same); *People v. Sutton*, 184 A.D.3d 236, 240 (2d Dep't 2020) (same); *People v. Weir*, 174 A.D.3d 1465, 1466 (4th Dep't 2019) (same). Here, Mr. Balogh admitted guilt before the lower court told him that he was also required to waive his right to appeal. In addition, Mr. Balogh signed the appeal waiver form prior to receiving any information from the court regarding what the right to appeal constitutes. *See, e.g., People v. Goins*, 177 A.D.3d 769, 769 (2d Dep't 2019); *People v. Mena*, 173 A.D.3d 1217, 1217 (2d Dep't 2019).

Because Mr. Balogh had already admitted to the court that he was guilty of the crime charged and had already signed the waiver form, he did not have a fair opportunity to reject the appeal waiver. His agreement to waive his right to appeal could not have been voluntary under these circumstances.

In addition to the timing of the waiver, the court's explanation of the waiver was also problematic, and it was not presented as something he could choose to reject. The court told Mr. Balogh that, as part of his guilty plea, he was "also waiving [his] right to appeal" (P 7). Even though the court later said that such a waiver is separate and distinct from the trial rights forfeited by a guilty plea (*id.*), in reality, the court left Mr. Balogh with the erroneous impression that the appeal waiver was mandatory and automatic given that he was taking a plea. *See People v. Moyett*, 7 N.Y.3d 892, 892-93 (2006) (appeal waiver invalid where court did not make clear that right to appeal is not, like trial rights, automatically waived with guilty plea); *People v. Thompson*, 219 A.D.3d 1666, 1667 (4th Dep't 2023) (same); *People v. Ellis*, 194 A.D.3d 428, 428 (1st Dep't 2021) (same).

Further, after explaining that the State would ordinarily appoint an appellate lawyer if he could not afford one, the court did not make it clear that Mr. Balogh would retain those rights after the waiver. *See Bisono*, 36 N.Y.3d at 1018 (finding appellate waiver invalid based, in part, on trial court's incorrect statements that waiver of appellate rights also included waiver of right to appellate counsel); *Thomas*, 34 N.Y.3d at 565-66 (same). The court told Mr. Balogh that, when taking an appeal, "[i]f [he] could not afford the costs of an appeal or a lawyer, the state would pay them. On appeal [he]

could argue normally through [his] lawyer that an error took place in this Court requiring reversal or modification of the conviction” (P 7). The only way for Mr. Balogh to interpret this statement is that, due to his waiver, he would not be entitled to appellate counsel. *See Haughton*, 229 A.D.3d at 468 (invalidating appeal waiver that mischaracterized nature of appeal waiver as forfeiture of right to counsel); *People v. Brenner*, 193 A.D.3d 875, 875 (2d Dep’t 2021) (same); *People v. Rivera*, 193 A.D.3d 766, 766 (2d Dep’t 2021) (same); *People v. Harlee*, 187 A.D.3d 1586, 1587 (4th Dep’t 2020) (same); *People v. McMillian*, 185 A.D.3d 1420, 1421 (4th Dep’t 2020) (same).

Mr. Balogh’s understanding of the appellate rights he was waiving was also impacted by his lack of experience with the criminal system. *See People v. Bouton*, 107 A.D.3d 1035, 1036 (3d Dep’t 2013) (defendant’s lack of prior criminal history was a consideration in finding appeal waiver invalid); *People v. Bradshaw*, 76 A.D.3d 566, 569 (2d Dep’t 2010) (same). Although Mr. Balogh signed a written waiver, the form cannot cure errors in the oral colloquy. *People v. Bonilla*, 211 A.D.3d 614, 615 (1st Dep’t 2022); *People v. Flores*, 134 A.D.3d 425, 426 (1st Dep’t 2015); *People v. Oquendo*, 105 A.D.3d 447, 448 (1st Dep’t 2013). Nor does Mr. Balogh’s consultation with his attorney save the purported waiver, for the court “cannot rely solely on defense counsel to explain the significance of the written waiver.” *Oquendo*, 105 A.D.3d at 448; *see also People v. Dewberry*, 223 A.D.2d 555, 555 (2d Dep’t 1996). While the court asked Mr. Balogh whether he discussed the waiver with his attorney, it did not make any independent

inquiry as to whether Mr. Balogh did, in fact, understand the substance of the waiver. *See Haughton*, 229 A.D.3d at 468 (finding appeal waiver invalid in part because court failed to ascertain whether defendant understood contents of written waiver, and this was defendant's first felony conviction). The court therefore did not satisfy its requirement of independent, on-the-record judicial review. For all the reasons above, the purported appeal waiver is invalid, and this Court should reach Mr. Balogh's claims on appeal.

POINT IV

Multiple probation conditions must be struck due to their lack of connection with Mr. Balogh's rehabilitation, their unconstitutionality, or their conflict with statute.

Mr. Balogh is subject to multiple probation conditions with various legal deficiencies. First, many of the conditions are unrelated to Mr. Balogh's rehabilitation and were imposed without considering his particular case and rehabilitative needs as directed by Penal Law § 65.10(1). Second, Conditions 7 and 24 are unconstitutionally vague and overbroad and infringe on Mr. Balogh's First Amendment association rights. Finally, Condition 10 is in direct conflict with C.P.L. § 420.35(1), which restricts the legality of imposing prison time for non-payment of court fees. Accordingly, all these conditions must be struck.

A. Many of the probation conditions are unrelated to Mr. Balogh's case and not tailored to his rehabilitation.

Many of the probation conditions imposed on Mr. Balogh are unrelated to the offense and are not tailored to Mr. Balogh's rehabilitation. *See* Penal Law § 65.10(1). Conditions of probation must be "reasonably related to a defendant's rehabilitation," rather than focused on deterrence or punishment. *People v. Letterlough*, 86 N.Y.2d 259, 265 (1995). That directive is embodied in Penal Law § 65.10(1), which provides, "[t]he conditions of probation and of conditional discharge shall be such as the court, in its discretion, deems reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so." This Court has not hesitated to strike down probation conditions when they are not reasonably related to a defendant's rehabilitation. *See People v. Alvarez*, 233 A.D.3d 619, 620 (1st Dep't 2024) (striking probation condition prohibiting defendant from using public transportation as not related to defendant's rehabilitation); *People v. Arias*, 210 A.D.3d 593, 594 (1st Dep't 2022) (striking condition allowing warrantless searches as it was "not reasonably related to defendant's rehabilitation or necessary to ensure that he will lead a law-abiding life"); *People v. Hall*, 228 A.D.3d 466, 467 (1st Dep't 2024) (same); *accord United States v. Sims*, 92 F.4th 115, 128-29 (2d Cir. 2024) (lower court must provide justification for why gang association condition was related to defendant's rehabilitation).

Here, nearly every condition of probation that is listed on the standard form is checked as requiring Mr. Balogh's compliance. Many of the probation conditions

imposed on Mr. Balogh are unrelated to the offense, to his rehabilitation, and to leading a law-abiding lifestyle, as is required by Penal Law § 65.10(1). Condition 7, which requires Mr. Balogh to “avoid injurious or vicious habits;” “refrain from frequenting unlawful or disreputable places;” and “not consort with disreputable people,” has no connection to the instant offense, which did not involve a vicious habit, frequenting a disreputable place, or consorting with anyone. Mr. Balogh has no criminal record; he had never even been arrested prior to this offense.

Further, this Court has recently struck down Condition 10 in *People v. Percy*, 2025 Slip Op. 00406, at 1 (1st Dep’t 2025), which requires Mr. Balogh to pay a surcharge and fees totaling \$375; Mr. Balogh is indigent (as is indicated by the appointment of this office) and is therefore not in a position to pay hundreds of dollars of fees and surcharges. This Court held in *Percy* that \$250 in court fees and surcharge would not “assist in ensuring [that the defendant, who is indigent and a first-time felony offender] leads a law-abiding life and is not reasonably related to his rehabilitation.” *Id.* Payment of this large sum is unrelated to and likely to interfere with Mr. Balogh’s rehabilitation.

Conditions 15 and 23 grant the Probation Department the discretion to force Mr. Balogh to submit to alcohol and drug testing and to participate in alcohol, substance abuse, or violence-related programming, even though the instant offense involved no substance use nor violence, and Mr. Balogh has no history of involvement in either. *See People v. Saraceni*, 153 A.D.3d 1559, 1560 (4th Dep’t 2017) (striking probation condition requiring defendant to submit to alcohol testing as not related to rehabilitation when

defendant was not under influence of alcohol or drugs at time of offense nor had history of drug or alcohol abuse).

Finally, the same reasoning applies to Condition 24, where Mr. Balogh must “refrain from wearing or displaying gang paraphernalia and having any association with a gang or members of a gang.” Mr. Balogh has no gang affiliation and no criminal record, nor was any alleged below. Moreover, it is inaccurate that all “gangs” and “gang” members are disreputable and engaged in criminality. *See Sims*, 92 F.4th at 126, 128-29 (“The record says nothing about a history of gang-related crimes, nor does it suggest a likelihood that Sims would commit gang-related crimes in the future”); *LoFranco v. U.S. Parole Comm’n*, 986 F. Supp. 796, 810 (S.D.N.Y. 1997) (commenting that not all “gangs” participate in unlawful behavior).

Many of the other probation conditions appear to have been even more carelessly imposed, totally inapplicable to Mr. Balogh: Conditions 14 (referencing support of dependents that Mr. Balogh does not have); 17 (only relevant to probationers who are under 21, while Mr. Balogh was 23 at the time of the offense); 18 (applicable to an Order of Protection where none was issued); 19 (to perform services for a corporation or institution while none are specified, as instructed by the condition); 20 and 21 (both only applicable to probationers convicted of sexual offenses).

Indeed, the Department of Probation only recommended imposing Condition 28 in the PSI, authorizing warrantless searches—none of these other conditions were included in its recommendation (PSI 8). It is clear that the imposition of these

conditions was not tailored to the facts of the offense or Mr. Balogh's rehabilitation. Accordingly, Conditions 7, 10, 14, 15, 17-21, 23, and 24 must be struck.

B. Conditions 7 and 24 are unconstitutionally vague and overbroad and infringe on Mr. Balogh's First Amendment association rights.

In addition to being unrelated to Mr. Balogh's rehabilitation, Conditions 7 and 24, which limit Mr. Balogh's habits, the places he can go, the clothes he can wear, and the people with whom he can interact, are unconstitutionally vague and overbroad. These conditions suffer from three deficiencies: (1) they do not provide Mr. Balogh with sufficient notice of which activities are prohibited; (2) they vest too much authority with his probation officer to find a probation violation; and (3) they chill Mr. Balogh's associational rights. Therefore, these conditions must be rejected. *See* U.S. Const. amends. I, V, XIV; N.Y. Const. art. I, § 6.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined . . . we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *see also United States v. Kunz*, 68 F.4th 748, 764-65 (2d Cir. 2023); *United States v. Simmons*, 343 F.3d 72, 81 (2d Cir. 2003); *United States v. Cabot*, 325 F.3d 384, 385 (2d Cir. 2003). The operative inquiry is whether the condition adequately advises the probationer of the conduct that they are required to avoid. *People v. Selby*, 210 A.D.3d 1015, 1016 (2d Dep't 2022).

Courts consistently strike conditions that are vague and impermissibly delegate authority to probation officers. *See United States v. Carlineo*, 998 F.3d 533, 536-37 (2d Cir. 2021) (supervised release condition did not put defendant “on notice as to what conduct could trigger a charge of violating the condition”); *Sims*, 92 F.4th at 125-26; *United States v. Matta*, 777 F.3d 116, 123 (2015) (vagueness in supervised release condition improperly delegated sentencing authority to probation department); *United States v. Green*, 618 F.3d 120, 124 (2d Cir. 2010) (supervised release condition prohibiting wearing gang-related clothing unconstitutionally vague); *United States v. Reeves*, 591 F.3d 77, 81 (2d Cir. 2010) (supervised release condition triggering obligations upon entering into “significant romantic relationship” void for vagueness); *People v. Tucker*, 302 A.D.2d 752, 753 (3d Dep’t 2003) (probation condition “prohibiting defendant from possessing any material that could reasonably be construed as pornography is vague and unenforceable”); *United States v. Bolin*, 976 F.3d 202, 215 (2020) (supervised release condition prohibiting online conduct that promoted or endorsed violence was unconstitutionally vague and violated defendant’s First Amendment rights).

This case is similar to *Reeves* in that the terms in Conditions 7 and 24 are open to significant interpretation and impact “protected associational interest[s].” 591 F.3d at 82. The terms in Condition 7—“injurious,” “vicious,” and “disreputable”—are sufficiently vague that it is unclear what Mr. Balogh is prohibited from doing. *See People v. Sorge*, 96 Misc.2d 922, 924 (Sup. Ct. Bronx Cty 1978) (recognizing that Condition 7 is “written in a manner that is clearly beyond the comprehension of many defendants,” is

“imprecise,” and should be reconsidered). “Habits” such as eating unhealthy food, smoking cigarettes, or spending an excessive amount of time on social media could all be labeled “injurious.” Similarly, it is virtually impossible for a person of ordinary intelligence to be confident in what constitutes a “disreputable” place or person. *United States v. MacMillen*, 544 F.3d 71, 76 (2d Cir. 2008) (explaining that a condition is “unconstitutional if it is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application” (internal citations and quotations omitted)).

The same applies for Condition 24, which impacts what Mr. Balogh can wear and with whom he can interact. What constitutes “gang paraphernalia” and who is considered a “member[] of a gang” is unclear; neither the probationer nor probation officer is made adequately aware of what conduct is prohibited. In *Green*, the Second Circuit found that a supervised release condition prohibiting wearing gang-related clothing was unconstitutionally vague. 618 F.3d at 123; *see also Unmasking the Boston Police Department’s Gang Database: How an Arbitrary System Criminalizes Innocent Conduct*, 137 Harvard L. Rev. 1381, 1387-88 (2024) (explaining that, in Boston Police Department gang database, items like Chicago Bulls gear, Air Jordan or Nike brand sneakers, black rosaries, and blue shirts have been identified as “paraphernalia”). Potential “gang” colors realistically include every color in the rainbow. *Green*, 618 F.3d at 124 (“The range of possible gang colors is vast and indeterminate”).

Other courts have also recognized the need for specificity. In *United States v. Washington*, the court found that the term “gang” is “undefined such that it gives no notice as to which groups of people are actually covered” and that “‘gang’ is not defined in any relevant statute,” citing to Black’s Law Dictionary. 893 F.3d 1076, 1081 (8th Cir. 2018). *See also LoFranco*, 986 F.Supp. at 810 (finding term “other motorcycle gangs” unconstitutionally vague); *State v. Weathermax*, 193 Wash.App. 667, 678 (App. Div. 3, 2016), *rev’d on other grounds* 188 Wash.2d 139 (2017) (quoting *State v. Villano*, 166 Wash App. 142, 144 (App. Div. 3, 2012) (“popular clothing items or specific colored items are frequently described as gang attire. If the trial court intended to prohibit the wearing of bandanas or particular colored shoes, it needed to provide clear notice”)). Furthermore, by restricting “any association with a gang or members of a gang,” Condition 24 impacts even incidental or otherwise lawful contact. *See, e.g., In re K.M.*, 117 N.E.3d 347, 353-54 (Ill.App. 1st Dist. 2018) (restriction that did not differentiate between lawful and unlawful contact with “gang members” was overly broad and “impossible for him to obey”).¹¹

¹¹ Alleged gang affiliations have also been recognized as racialized. A 2010 survey of defense attorneys revealed that 86.8% of respondents have represented Black and Latino clients alleged to have a gang affiliation, compared to 24.5% who reported representing white clients with these same alleged affiliations. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-Trial Detention*, 23 St. Thomas Law Review 620, 636 (2010); *see also* Nazgol Ghandnoosh and Celeste Barry, *Sentencing Project, One in Five: Racial Disparity in Imprisonment—Causes and Remedies* (2023), <https://www.sentencingproject.org/publications/one-in-five-racial-disparity-in-imprisonment-causes-and-remedies/> (in California, over 90% of people who received a “gang enhancement” in 2020 were Black or Latinx and “[f]our out of five people in the [discontinued Virginia GangNet] database were Black or Latinx, raising questions of racial profiling and erroneous gang classifications across the database’s construction”).

This leads to a second, related problem with Conditions 7 and 24. Since the terms in Condition 7, “injurious,” “vicious,” and “disreputable,” are overbroad and vague, probation officers are granted considerable discretion to decide what violates the condition. The same applies to “gang paraphernalia” and “members of a gang” in Condition 24. Only by vesting improper authority in the probation officer can these terms be defined. This is impermissible: while a court may delegate to probation the authority “over certain minor details of supervised release,” it may not delegate “decision making authority which would make a defendant’s liberty itself contingent on a probation officer’s exercise of discretion.” *United States v. Birkedahl*, 973 F.3d 49, 54 (2d Cir. 2020); *see also Carlineo*, 998 F.3d at 536-37; *Matta*, 777 F.3d at 122-23.

Conditions 7 and 24 also “abut[] upon sensitive areas of basic First Amendment freedoms” by infringing on Mr. Balogh’s protected associational interests and personal expression. *Grayned*, 408 U.S. at 109. Mr. Balogh has a right to decide what to wear and to enter into and maintain personal relationships, and these conditions unnecessarily burden that right. *See Reeves*, 591 F.3d at 81; *People v. O’Neil*, 165 Cal. App. 4th 1351, 1357-58 (1st Dist. 2008) (rejecting probation condition as violation of probationer’s First Amendment right to associate that did not provide guidance and “meaningful standard” for whom probation department can forbid association with); *Jones v. State*, 41 P.3d 1247, 1259-60 (Wyo. 2022) (condition limiting defendant’s freedom of association can only be upheld to “further the ends of rehabilitation or protect the public” and the sentencing court must indicate why the restriction is necessary).

A violation of probation can lead to revocation of the non-incarceratory sentence and imposition of a prison sentence.¹² It is essential, therefore, that a probationer know what they are prohibited from doing. Yet, here, Condition 7—which is derived from statute, *see* Penal Law §§ 65.10(2)(a), (b)—is unconstitutionally vague and overbroad, requires significant interpretation by a probation officer, and chills Mr. Balogh’s associational rights. Condition 24, which is also unacceptably vague, overbroad, and discretionary, is not even included in the Penal Law. Both conditions must, therefore, be struck. *See* U.S. Const. amends. I, V, XIV; N.Y. Const. art. I, § 6.

C. Condition 10 conflicts with C.P.L. § 420.35(1).

Finally, Condition 10 conflicts with C.P.L. § 420.35(1), which sets strict limits on imprisonment for failure to pay a mandatory surcharge, crime victim assistance fee, DNA databank fee, and sex offender fees. Under § 420.35(1), the period of imprisonment for failure to pay fees may not exceed 15 days. In addition, a period of imprisonment may only be imposed upon a “contemporaneous finding on the record, after according defendant notice and an opportunity to be heard, that the payment of the [surcharge and fees] upon defendant will not work an unreasonable hardship upon him or her or his or her immediate family.” C.P.L. § 420.35(1). Yet, by imposing this surcharge and fees as a probation condition, the lower court created the possibility that,

¹² Notably, Condition 7 is often the basis of a probation violation. *See, e.g., People v. Thompson*, 189 A.D.3d 1969, 1970 (3d Dep’t 2020) (“there is scant case law interpreting what constitutes a vicious or injurious habit”); *People v. French*, 72 A.D.3d 1397, 1398 (3d Dep’t 2010); *People v. West*, 283 A.D.2d 721, 722 (3d Dep’t 2001).

with violation of this condition, it could impose a multi-year prison sentence. The conflict between this probation condition and C.P.L. § 420.35(1) provides an additional basis for striking probation Condition 10. *People v. Hakes*, 32 N.Y.3d 624, 632 (2018) (quoting *People v. Amorosi*, 96 N.Y.2d 180, 184 (2001) (“[D]epriving probationers of conditional freedom based simply on their indigence would be an invidious denial to one class of defendants of a substantial benefit available to another.”)).

Because these issues go to the legality of the sentence imposed, they survive even a valid waiver of the right to appeal and do not require preservation. *Perry*, 2025 Slip Op. 00406, at 1; *Arias*, 210 A.D.3d at 594; *People v. Dranchuk*, 203 A.D.3d 741, 742 (2d Dep’t 2022).

CONCLUSION

For the reasons stated herein, this Court should vacate the conviction and dismiss the indictment. In the alternative, this Court should reduce Mr. Balogh’s sentence in the interest of justice and should strike the illegitimate probation conditions.

Respectfully submitted,

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Center for Appellate Litigation
Attorney for Defendant-Appellant

Rina DeFrancesco
Of Counsel

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

-----X
THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, : Bronx County
Ind. No. 70327/23
-against- : ACN: 2023-03397

MATA BALOGH, :

Defendant-Appellant. :

-----X

STATEMENT PURSUANT TO RULE 5531

1. The indictment number in the court below was 70327/23.
2. The full names of the original parties were People of the State of New York against Mata Balogh. There have been no changes of parties on appeal.
3. This action was commenced in Supreme Court, Bronx County.
4. This action was commenced by the filing of an indictment.
5. This is an appeal from a judgment of conviction rendered June 21, 2023, by the Supreme Court, Bronx County, convicting appellant, upon a guilty plea, of one count of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110, 265.03(3)), and sentencing him to a term of five years' probation (Lorenzo, J., at plea and sentence).
6. Appellant has been granted permission to appeal as a poor person on the original record. The appendix method is not being used.

PRINTING SPECIFICATIONS STATEMENT

This brief was prepared in Microsoft Word, using a 14-point Garamond font in the body and 12-point Garamond font in the footnotes. It totals 9,414 words.

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

-----X
THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- :

Bronx County
Ind. No. 70327/23
ACN: 2023-03397

MATA BALOGH, :

Defendant-Appellant. :

-----X
AFFIRMATION OF SERVICE OF BRIEF ON DISTRICT ATTORNEY

RINA DEFRANCESCO, an attorney duly admitted to the practice of law in this State, does hereby affirm and show:

That on March 20, 2025, the within brief for defendant-appellant was served upon Hon. Darcel D. Clark, District Attorney, Bronx County, by emailing a copy to appellatebriefs@bronxda.nyc.gov, the email address designated by her and consented to by her for that purpose.

I affirm this 20th day of March, 2025, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

Dated: New York, New York
March 20, 2025



Rina DeFrancesco

SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY: CRIMINAL TERM

The People of the State of New York,

Respondent,

-against-

MATA BALOGH,

Defendant-Appellant.

Bx Cty. Ind. No. 70327/23
ACN: 2023-03397

NOTICE OF CONSTITUTIONAL CHALLENGE

Please take notice that, under C.P.L.R. § 1012(b) and Executive Law § 71, Defendant-Appellant hereby notifies the Attorney General of the State of New York that, in his appeal before the Appellate Division First Department, in the above matter, he asserts, among other constitutional challenges, that Penal Law § 400.00(1)(b), as incorporated by Penal Law § 265.20(a)(3) and Penal Law 265.03(3), violate the Second Amendment to the United States Constitution. He additionally asserts that Conditions of Probation 7, authorized by Penal Law §§ 65.10(2)(a), (b), and 24 violate the First, Fifth, and Fourteenth Amendments to the United States Constitution. A copy of defendant's appellate brief in this matter is attached.

New York, New York
March 20, 2025

TO: Office of the Attorney General
Division of Appeals & Opinions
28 Liberty St.
New York, NY 10005

Ira Feinberg, Deputy Solicitor
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The People of the State of New York,
Respondent,
-against-
MATA BALOGH,
Defendant-Appellant.

AFFIRMATION OF SERVICE UPON THE ATTORNEY GENERAL

Rina DeFrancesco, an attorney admitted to practice law in this State, affirms under penalty of perjury:

2. On March 20, 2025, the enclosed **APPELLANT'S BRIEF IN THE APPELLATE DIVISION FIRST DEPARTMENT UNDER INDICTMENT NO. 70327/23** and **NOTICE OF CONSTITUTIONAL CHALLENGE** were served upon the Attorney General of New York by mailing these documents to the Attorney General at: **Office of the Attorney General Division of Appeals & Opinions, 28 Liberty St., New York, NY 10005**, the address designated for such service, by depositing these documents in a first class, prepaid, properly addressed wrapper, in a depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Dated: March 20, 2025, New York

113a

To be argued by:
CHRISTOPHER P. MARINELLI
(10 MINUTES REQUESTED)

New York Supreme Court

Appellate Division - First Department

Bronx County Ind. No.: 70327/23
Appellate Case No. 2023-03397

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

MATA BALOGH,

Defendant-Appellant.

BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT.....	1
INTRODUCTION.....	1
PLEA AND SENTENCING PROCEEDINGS	4
POINT I.....	10
Defendant Knowingly, Intelligently, And Voluntarily Waived His Right To Appeal (Answering Defendant’s Brief, Points III).	10
POINT II	16
Defendant’s Appeal Waiver And Lack Of Standing Foreclose Review Of His <i>Bruen</i> Claim. In Any Event, Defendant Had No Second Amendment Right To Carry An Unlicensed Gun In Public (Answering Defendant’s Brief, Point I).....	16
A. This Court Has Repeatedly Held That Appeal Waivers Encompass <i>Bruen</i> Claims.	17
B. Defendant Lacks Standing To Challenge The State’s Firearm Licensing Laws.....	18
C. The Supreme Court’s Decision In <i>Bruen</i> Did Not Prevent Defendant’s Prosecution For Carrying An Unlicensed Gun In Public.....	23
1. New York’s Gun Licensing Scheme	23
2. Aside From The Defunct “Proper Cause” Requirement, <i>Bruen</i> Did Not Invalidate The Remainder Of New York’s Gun Licensing Scheme.....	24
3. Defendant’s Conviction Is Consistent With <i>Bruen</i>	28
POINT III.....	31
Defendant Waived Any Challenge To The Severity Of His Just, Negotiated Sentence (Answering Defendant’s Brief, Point II).....	31

POINT IV	35
Defendant's Challenges To The Conditions Of His Probation Are Unavailing (Answering Defendant's Brief, Point IV).....	35
A. Defendant Waived His Constitutional Challenges To Probation Conditions 7 and 24 And Has Failed To Provide A Sufficient Record to Review His Claim That They Are Not Reasonably Necessary To Ensure He Leads A Law-Abiding Life.	35
B. Defendant's Failure To Create A Proper Record Has Deprived The Court Of A Basis To Assess His Complaints About Other Conditions Of Probation.....	39
C. The People Take No Position With Respect To Defendant's Request To Strike Condition 10.	41
CONCLUSION	43

TABLE OF AUTHORITIES

	PAGE(S)
<u>FEDERAL CASES</u>	
<i>Allen v. Wright</i> , 468 U.S. 737 (1984)	18
<i>Antonyuk v. James</i> , 120 F.4th 941 (2d Cir. 2024)	29
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008)	<i>Passim</i>
<i>Lovell v. Griffin</i> , 303 U.S. 444 (1938)	21
<i>McDonald v. City of Chicago</i> , 561 U.S. 742 (2010)	25
<i>Moose Lodge No. 107 v. Iris</i> , 407 U.S. 163 (1972)	18
<i>New York State Rifle & Pistol Assn., Inc. v. Bruen</i> , 597 U.S. 1 (2022)	<i>Passim</i>
<i>Shuttlesworth v. Birmingham</i> , 394 U.S. 147 (1969)	20, 21
<i>Smith v. Caboon</i> , 283 U.S. 553 (1931)	21, 22
<i>Staub v. City of Baxley</i> , 355 U.S. 313 (1958)	20, 21
<i>Texas v. United States</i> , 523 U.S. 296 (1998)	39
<i>United States v. Decastro</i> , 682 F.3d 160 (2d Cir. 2012)	18, 20

STATE CASES

<i>Caputo v. Kelly</i> , 117 A.D.3d 644 (1st Dept. 2014)	29
<i>Church of St. Paul & St. Andrew v. Barnwick</i> , 67 N.Y.2d 510 (1986).....	39, 40
<i>Klenosky v. New York City Police Dept.</i> , 75 A.D.2d 793 (1st Dept. 1980)	24
<i>People v. Alvarez</i> , 233 A.D.3d 619 (1st Dept. 2024)	18
<i>People v. Bailey</i> , 181 A.D.3d 1243 (4th Dept. 2020)	42
<i>People v. Bailey</i> , 234 A.D.3d 560 (1st Dept. 2025)	30
<i>People v. Benjamin</i> , 216 A.D.3d 1457 (4th Dept. 2023)	17
<i>People v. Brisman</i> , 43 N.Y.3d 322 (2025).....	31
<i>People v. Bryant</i> , 28 N.Y.3d 1094 (2016).....	12
<i>People v. Cabrera</i> , 41 N.Y.3d 35 (2023).....	17
<i>People v. Castillo</i> , 226 A.D.3d 573 (1st Dept. 2024)	12, 17
<i>People v. Chase</i> , 223 A.D.3d 913 (2d Dept. 2024)	30
<i>People v. Choncey Chance</i> , ___A.D.3d___, 2025 WL 2857066 (1st Dept., Oct. 9, 2025)	36

<i>People v. Martin</i> , 241 A.D.3d 1211 (1st Dept. 2025)	20
<i>People v. David</i> , 41 N.Y.3d 90 (2023)	17
<i>People v. Day</i> , 73 N.Y.2d 208 (1989)	31
<i>People v. Delgado</i> , 80 N.Y.2d 780 (1992)	31
<i>People v. Elijah Santiago</i> , ___ A.D.3d ___, 2025 WL 2906859 (1st Dept., Oct. 14, 2025)	14
<i>People v. Fair</i> , 33 A.D.3d 558 (1st Dept. 2006)	32
<i>People v. Farrar</i> , 52 N.Y.2d 302 (1981)	31
<i>People v. Fuller</i> , 57 N.Y.2d 152 (1982)	37
<i>People v. Garcia</i> , 41 N.Y.3d 62 (2023)	20
<i>People v. Guzman</i> , 237 A.D.3d 570 (1st Dept. 2025)	29
<i>People v. Vasquetelles</i> , 241 A.D.3d 1208 (1st Dept. 2025)	36
<i>People v. Jackson</i> , 225 A.D.3d 547 (1st Dept. 2024)	18
<i>People v. Javier Rosario</i> , ___ A.D.3d ___, 2025 WL 2906876 (1st Dept., Oct. 14, 2025)	14
<i>People v. Joel R.</i> , ___ A.D.3d ___, 2025 WL 2832082 (1st Dept., Oct. 7, 2025)	18, 20

<i>People v. Johnson</i> , 118 Misc.2d 983 (Crim. Ct., Queens County 1983)	38
<i>People v. Johnson</i> , 225 A.D.3d 453 (1st Dept. 2024)	17, 18, 30
<i>People v. Jones</i> , 26 N.Y.3d 730 (2016).....	42
<i>People v. Junco</i> , 43 A.D.2d 266 (1st Dept. 1974)	31
<i>People v. Kinchen</i> , 60 N.Y.2d 772 (1983).....	38
<i>People v. Lance Lombard</i> , ___ A.D.3d ___, 2025 WL 2698091 (1st Dept., Sept. 23, 2025)	36, 37
<i>People v. Liriano</i> , 226 A.D.3d 520 (1st Dept. 2024)	30
<i>People v. Lopez</i> , 6 N.Y.3d 248 (2006).....	32
<i>People v. Lowndes</i> , 239 A.D.3d 574 (1st Dept. 2025)	36, 37
<i>People v. Maldonado</i> , 230 A.D.3d 1069 (1st Dept. 2024)	18
<i>People v. Martinez</i> , 238 A.D.3d 423 (1st Dept. 2025)	29
<i>People v. McNair</i> , 87 N.Y.2d 772 (1996).....	37
<i>People v. Myatt</i> , 248 A.D.2d 68 (3d Dept. 1998).....	37
<i>People v. Percy</i> , 234 A.D.3d 619 (1st Dept. 2025)	42

<i>People v. Romanelli</i> , 188 A.D.3d 1354 (3d Dept. 2020).....	37
<i>People v. Samms</i> , 95 N.Y.2d 52 (2000).....	36
<i>People v. Scott</i> , 226 A.D.3d 443 (1st Dept. 2024)	35
<i>People v. Tarazona</i> , 239 A.D.3d 544 (1st Dept. 2025)	20
<i>People v. Tariq Gouldbourne</i> , ___ A.D.3d ___, 2025 WL 2956442 (1st Dept., Oct. 21, 2025)	17
<i>People v. Thomas</i> , 34 N.Y.3d 545 (2019).....	10, 15, 31
<i>People v. Velardo</i> , 228 A.D.3d 520 (1st Dept. 2024)	17
<i>People v. Watts</i> , 234 A.D.3d 620 (1st Dept. 2025)	29
<i>People v. Williams</i> , 227 A.D.3d 480 (1st Dept. 2024)	12, 17
<i>People v. Yiz̧ar</i> , 240 A.D.3d 416 (1st Dept. 2025)	14, 15
<i>Sanicola v. City of New York</i> , 224 A.D.3d 578 (1st Dept. 2024)	29
<i>Sullivan v. N.Y. State Comm’n on Public Ethics</i> , 207 A.D.3d 117 (3d Dept. 2022).....	40

STATE STATUTES

Criminal Procedure Law § 220.10	13
Criminal Procedure Law § 410.10	35
Criminal Procedure Law § 410.20	41
Criminal Procedure Law § 410.90	33, 41
Criminal Procedure Law § 420.35	42
Criminal Procedure Law § 440.20	38
Criminal Procedure Law § 470.15	31
Executive Law § 71	37
Penal Law § 60.01	41
Penal Law § 65.00	31
Penal Law § 65.10	36, 42
Penal Law § 70.02	23, 32
Penal Law § 110.00	32
Penal Law § 265.01	2, 23, 28
Penal Law § 265.01-b	2
Penal Law § 265.02	2, 28, 32
Penal Law § 265.03	<i>Passim</i>
Penal Law § 265.20	23
Penal Law § 400.00	19, 23, 24

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

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

MATA BALOGH,

Defendant-Appellant.

BRIEF FOR APPELLANT
PRELIMINARY STATEMENT

Defendant Mata Balogh appeals from a June 21, 2023 judgment of Supreme Court, Bronx County (Lorenzo, J., on plea and sentence; Mitchell, J. on motion to dismiss), convicting him, on his plea of guilty, of Attempted Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03(3)) and sentencing him to five years' probation. Defendant remains on probation.

INTRODUCTION

On August 1, 2022, at about 10:00 p.m., a police officer saw defendant with a nine-millimeter, semi-automatic handgun in his pants' pocket, outside 2359 Valentine Avenue in the Bronx. Officers apprehended defendant and recovered the weapon. Following his arrest, defendant told officers that he was "just trying to protect [him]self." Database searches revealed that defendant had no license for the gun. Further inspection determined that: the weapon was loaded and operable; the gun had

an unfinished frame and no serial number; and the barrel was threaded and capable of receiving a silencer, flash suppressor, or forward handgrip.¹

By Bronx County Indictment Number 70327/23, filed on or about January 26, 2023, a grand jury charged defendant with two counts each of Criminal Possession of a Weapon in the Second (Penal Law §§ 265.03(1)(b), (3)) and Fourth Degrees (Penal Law §§ 265.01(1), (2)) and one count each of Criminal Possession of a Weapon in the Third Degree (Penal Law § 265.02(3)) and Criminal Possession of a Firearm (Penal Law § 265.01-b(1)).

Prior to trial, defendant moved to dismiss the indictment on the ground that his prosecution was barred by the Second Amendment to the federal constitution, as explicated in *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597 U.S. 1 (2022). Alternatively, defendant sought to suppress physical evidence and his statements. On April 14, 2023, the Honorable Guy H. Mitchell denied defendant's motion to dismiss and ordered a combined *Mapp/Huntley/Dunaway* hearing.

However, before any hearings were conducted, on May 5, 2023, defendant pled guilty to attempted second-degree weapon possession and waived his right to appeal in exchange for a promised sentence of five years' probation. On June 21, 2023, the Honorable Albert Lorenzo sentenced defendant as promised.

¹ This factual recitation is derived from the plea and sentencing proceedings, indictment, felony complaint, and presentencing report prepared by the Department of Probation (PSR).

On appeal, defendant contends: that his waiver of his right to appeal was invalid; that his prosecution was unlawful under *Bruen*; that his sentence is excessive; and that a number of the conditions of probation imposed upon him are either unconstitutional or not reasonably necessary to ensure that he leads a law-abiding life.

In fact, defendant waived his right to appeal knowingly, intelligently, and voluntarily, foreclosing review of his *Bruen* and excessive-sentence claims and his constitutional complaints concerning the conditions of probation. Moreover, the court below correctly determined that defendant lacked standing to raise a *Bruen* challenge. Furthermore, defendant's negotiated sentence is just. Lastly, by failing to raise any objection to the conditions of probation, defendant has failed to provide a record sufficient to review his complaints about them. However, as a matter of prosecutorial discretion, the People take no position on defendant's request to strike a condition requiring him to pay the mandatory surcharge and required fees.

PLEA AND SENTENCING PROCEEDINGS

On May 5, 2023, defendant and his attorney appeared before the Honorable Albert Lorenzo. The People recounted that they had tendered an offer of a plea to attempted second-degree weapon possession, in exchange for a sentence of five years' probation. The plea deal required defendant to waive his right to appeal. The court remarked that its understanding was that the offer was "based on the fact that defendant ha[d] no criminal record" and elicited from defense counsel confirmation that defendant was employed (P3).²

The court confirmed with the People that the agreement included an appeal waiver, then instructed, "You can do the waiver and then we'll begin." The record reflects a "[p]ause in proceedings[.]" after which defense counsel reported that the written appeal waiver form was "completed" (P4).

In the written waiver, defendant acknowledged that, "in addition to pleading guilty[.]" he was waiving his right to appeal. Defendant certified he understood: that the right to appeal is "separate and distinct from the rights automatically forfeited upon a guilty plea"; that, without the appeal waiver, he would have been able, with assistance of counsel, to have a higher court review his conviction, "particularly" whether his "statutory right to a speedy trial" had been violated, the severity of his sentence, and the determination of any suppression motion; that he was "waiving that right to appeal

² Parenthetical citations preceded by "P" and "S" are, respectively, to the May 5, 2023 plea proceeding and to sentencing on June 21, 2023.

as a condition” of his plea agreement; and that he could still raise “certain limited issues on appeal,” including the validity of his plea and waiver, the legality of his sentence, whether he was entitled to a youthful offender adjudication, questions of his “constitutional speedy trial” rights, and his “competency to stand trial” (Waiver of the Right to Appeal (“Waiver”)).

In addition, defendant acknowledged: that he had an opportunity to discuss the waiver with his attorney; that “any questions” he had about the waiver had been answered to his satisfaction; and that he could ask for further clarification from the court or his attorney before signing the waiver. Defendant and his attorney both signed the written waiver. The court also signed the waiver, certifying that defendant had executed the waiver with the “advice and consent” of defense counsel and the approval of the court (Waiver).

Next, defense counsel stated that defendant had authorized her to withdraw his previously-entered plea of not guilty and enter a plea of guilty to attempted second-degree weapon possession, in exchange for a sentence of five years’ probation (P4). In response to the court’s questions, defendant averred that he wished to plead guilty as his attorney indicated and that he was satisfied with his attorney’s representation (P5). Defendant then admitted that, on or about August 1, 2022, he possessed a loaded firearm outside his home or place of business without a license to do so (P5-6). Thus, defendant pled guilty to attempted second-degree weapon possession (P6).

Defendant then confirmed that he understood that, by pleading guilty, he was surrendering his rights: to move to suppress evidence; to a trial with the assistance of counsel; to confront and cross-examine the People's witnesses; to remain silent; to testify on his own behalf; to present witnesses; to raise any defense to his crime; and to have the People prove his guilt to a jury beyond a reasonable doubt (P5-7).

Defendant further confirmed that he understood that, "[o]rdinarily a defendant retains the right to appeal after pleading guilty[,]” but that he was being “asked to waive [his] right to appeal.” Defendant averred that he understood that the appeal waiver was “separate and distinct from the waiver of a trial and other rights by a plea of guilty.” Defendant further avowed: that he understood that an appeal was a proceeding before a higher, appellate court; that, if he could not afford the costs of an appeal or an attorney, the State would provide one; that, “normally through [his] lawyer[,]” defendant could argue on appeal that an “error took place...requiring reversal or modification” of the conviction; and that a reversal could entail either a dismissal of the case or further proceedings (P7).

Defendant confirmed that he understood that he was not surrendering his right to file a Notice of Appeal. Rather, he appreciated that he was surrendering only the right to have the appellate court “consider most claims of error[,]” including whether his sentence was excessive and should be modified. Thus, defendant acknowledged, following an appeal waiver, a “conviction and sentence is normally final” (P7-8). However, defendant understood that “[c]ertain claims survive the waiver of the right to

appeal[,]” including the voluntariness of the plea and waiver, the legality of the sentence, and the jurisdiction of the court (P8).

In turn, defendant declared that he “voluntarily waived [his] right to appeal in return for the plea and promised sentence” (P8). Defendant further averred: that no other promises had been made to induce his plea; that no one had forced or threatened him to plead guilty; and that he was pleading guilty voluntarily because he was, in fact, guilty (P8-9). Finally, defendant formally withdrew his previously-entered plea of not guilty and pled guilty to attempted second-degree weapon possession (P10).³

On June 21, 2023, defendant and counsel appeared before Justice Lorenzo for sentencing. The parties declined to address the court (S2). The court then sentenced defendant as promised. The court noted that, before defendant left the courtroom, he needed to receive required “paperwork.” The court further observed that defendant was required to pay a mandatory surcharge and DNA and victims assistance fees (S2-3). The clerk then informed defendant of his right to appeal and noted that defendant had received a written notice of his right to appeal (S3).

In the presentencing report, the Probation Department requested that defendant be required to consent to searches of his person and residence for the safety of any

³ Defendant further confirmed that he understood: that his conviction by plea was the same as a conviction at trial; that his conviction could be the basis for additional punishment if he was convicted of another crime in the future; and that, to secure the promised sentence, he needed to meet with the Probation Department, return to court for sentencing, and not be rearrested prior to sentencing (P7, 9).

probation officers conducting home visits (PSR: 8). The court provided defendant a form setting forth his conditions of probation. Among other conditions, the court required defendant: to “[a]void injurious or vicious habits” and “unlawful or disreputable” persons and places (Condition 7) and to refrain from wearing or displaying gang “paraphernalia” or associating with gang members (Condition 24).

The court further decreed that, if so directed by Probation, defendant was to submit to alcohol and drug testing (Condition 15) and undergo treatment (Condition 23). The court also directed defendant: to support any dependents and meet “other family responsibilities” (Condition 14); if he was under 21 years of age, to follow Probation guidance as to residence and education (Condition 17); to follow any order of protection (Condition: 18); to perform community service for any designated institution, although no such institution was specified (Condition 19); and, if convicted of a sex offense, to avoid school facilities (Condition 20) and comply with the Sexual Offender Registration Act (SORA) (Condition 21). Finally, the court directed defendant to pay the mandatory surcharge and fees (Condition 10) (Orders & Conditions of Probation form (Probation Form)).⁴

⁴ The court further required defendant: to lead a law-abiding life and refrain from obtaining firearms; to work faithfully at suitable employment and pay any ordered restitution; to remain in the jurisdiction, unless authorized by the court or Probation to leave; to report to Probation and notify the department of any change in address or employment, arrest, or questioning by law enforcement; to answer reasonable inquiries from Probation, keep any curfew it imposed, submit to searches of his person, residence, and vehicle; to undergo any

Defendant signed the form, thereby “agree[ing] to comply” with the designated conditions. Defendant acknowledged that, if alleged to have violated any of the conditions, he was entitled to a hearing, at which he had the rights to be present and to the assistance of counsel. Defendant further acknowledged that, at any time, the court could modify the conditions (Probation Form, p.3).

medical or psychiatric treatment directed by Probation; to provide a DNA sample; and to waive extradition in the case (Probation Form ¶¶ 1-5, 7-16, 18, 22-23).

POINT I

Defendant Knowingly, Intelligently, And Voluntarily Waived His Right To Appeal (Answering Defendant's Brief, Points III).

After conferring with his attorney about a written waiver of appeal and having the plea court explain the appeal waiver to him orally, defendant confirmed both that he understood the court's explanation and that he "voluntarily waived [his] right to appeal in return for the plea and promised sentence" (P4, 7-8). Nonetheless, defendant now asks this Court to disregard, among other factors, his own sworn statements and find his waiver invalid (Defendant's Brief (DB): 22-26). Defendant's contentions are meritless.

A waiver of the right to appeal is valid if it is knowing, intelligent, and voluntary. *People v. Thomas*, 34 N.Y.3d 545, 560 (2019). The Court of Appeals has "never required any particular litany" to find a valid waiver. *Id.* at 559. Instead, courts look to "the totality of the circumstances" to determine if "the defendant understood the nature of the appellate rights being waived." *Id.* at 559-60. To that end, courts should examine, among other things, "the nature and terms of the agreement and the age, experience and background of the accused" as well as "the defendant's consultation with counsel and on-the-record acknowledgements of understanding, a written appeal waiver that supplements or clarifies the court's oral advice and the defendant's experience with the criminal justice system." *Id.* at 560 (citations omitted). Here, defendant validly waived his right to appeal.

The court allocuted defendant through a textbook waiver of appeal that closely followed the model colloquy. *See* CJI2d Right to Appeal Waived. The court carefully explained to defendant that he forfeited certain rights simply by pleading guilty and that he was additionally being “asked to waive [his] right to appeal” as part of the plea agreement to secure its promised sentence (P6-7). Similarly, the written waiver spelled out that, “in addition to pleading guilty[,]” he was waiving his right to appeal “as a condition” of the plea offer (Waiver). Still further, both the court and written waiver emphasized that the right to appeal was “separate and distinct” from the rights surrendered by plea (P7; Waiver). The court and written waiver each explained that the right to appeal encompassed the right to, with assistance of counsel, ask an appellate court to review the proceedings (P7-8; Waiver). Further, the court and written waiver also detailed that, notwithstanding the appeal waiver, defendant could still raise on appeal certain limited issues (P8; Waiver). Defendant affirmed under oath, and certified in writing, that he understood all of the foregoing (P6-8; Waiver).

Furthermore, the record reflects the court pausing the proceedings for defendant to review the written waiver with his attorney, and defendant confirming that he was satisfied with counsel’s representation (P5). More particularly, in the written waiver, defendant certified that any questions he had had about the waiver had been answered to his satisfaction and that he was free to request clarification from the court and/or his attorney before signing the written waiver (Waiver). Defendant made no such request, but rather, as noted, told the court that he understood what it meant to waive

his right to appeal and that he voluntarily did so (P7-8). The record provides no basis to second-guess defendant's clear and unequivocal statements.

Still, defendant insists that, because he executed the written waiver and allocuted to the crime before the court discussed the waiver with him, he “did not have a fair opportunity to reject” the waiver (DB: 24). But, this Court has repeatedly rejected the contention that the timing during a plea colloquy of an appeal waiver serves as a litmus test as to the waiver's validity. *See People v. Williams*, 227 A.D.3d 480, 481 (1st Dept. 2024), *lv. denied* 42 N.Y.3d 1022 (2024) (with leave to renew); *People v. Castillo*, 226 A.D.3d 573, 574 (1st Dept. 2024), *lv. denied* 41 N.Y.3d 1017 (2024); *see also People v. Bryant*, 28 N.Y.3d 1094, 1095-96 (2016).

Moreover, defendant reviewed the written waiver with counsel before he expressed his desire to plead guilty. This supports the conclusion that defendant knowingly, intelligently, and voluntarily waived his right to appeal. Indeed, as noted, defendant certified that he understood the written waiver. Furthermore, although it has been suggested that the better practice is to allocute a defendant on an appeal waiver before an admission of guilt, *see, e.g., Williams*, 227 A.D.3d at 481, the model plea colloquy recommends the practical step of confirming a defendant's willingness to admit guilt before undertaking a complete allocution concerning either the appeal waiver or the plea itself. *See* CJI2d Guilty Plea Colloquy. Further, the court did not formally enter defendant's guilty plea until after the court thoroughly explained the appeal waiver and defendant confirmed that he understood it (P10). Thus, it is clear

that defendant was not locked into his plea until after the court had fully explained the waiver to him.

Relatedly, defendant complains that the appeal waiver was “not presented as something he could choose to reject” (DB: 24). But this makes no sense, as the appeal waiver was a condition of this particular negotiated bargain. The critical fact is that both the court and the written waiver made clear that the appeal waiver was “separate and distinct” from the rights forfeited by guilty plea (P7; Waiver). The court explained to defendant that he was being “asked” to waive his right to appeal as part of the plea agreement; the written waiver emphasized that defendant waiving appeal was a “condition” of the plea offer; and defendant acknowledged that he was doing so “in return for the plea and promised sentence” (P6-8; Waiver). There was nothing misleading about the foregoing or the court telling defendant that the People “required” him to waive appeal (P6-7). Again, the appeal waiver was a condition of the plea upon which the People insisted in exchange for their consent to the lenient disposition. *See* CPL § 220.10(4).

Finally, defendant complains that the court “did not make clear” that he had the right to counsel to pursue those claims that did survive his appeal waiver (DB: 24). But defendant plainly understood his right to appellate counsel. Barely two months after sentencing, defendant had counsel appointed to represent him on appeal. M-2024-03961. And, of course, he is represented by counsel on this appeal.

Notably, too, informing a defendant of his right to counsel on appeal is not necessarily a *sine qua non* of a valid waiver, so long as the court’s colloquy does not mislead the defendant. *See People v. Elijah Santiago*, ___ A.D.3d ___, 2025 WL 2906859 (1st. Dept., Oct. 14, 2025) (“Although neither the oral colloquy nor the written waiver advised defendant of his right to counsel on appeal, the court ‘did not imply that by waiving appeal, defendant would forfeit his right to appellate counsel for claims that survived the waiver[.]’” *quoting People v. Yiz̧ar*, 240 A.D.3d 416, 416 (1st Dept. 2025), *lv. denied* 44 N.Y.3d 985 (2025)). And, the court’s colloquy was not misleading here.

In fact, in explaining the appellate process, the court informed defendant that, if he could not “afford the costs of an appeal or a lawyer,” the State would assume those costs (P7). Likewise, the written waiver informed defendant that the right to appeal included the prerogative to do so with the “assistance of an attorney” (P7; Waiver). And, as discussed above, the court and written waiver explained to defendant that certain claims survived the waiver of appeal (P8; Written Waiver). Under the circumstances, defendant had no reason to believe that the right to counsel did not extend to pursuing those limited claims that survived his waiver.

Indeed, this Court has found that the language like the foregoing, which tracks the model colloquy, *see* CJI2d Right to Appeal Waived, and the written waiver employed by the People accurately convey a defendant’s right to counsel on appeal. *See People v. Javier Rosario*, ___ A.D.3d ___, 2025 WL 2906876 (1st Dept., Oct. 14, 2025) (“the language in the colloquy[.]” which “tracked the model colloquy endorsed by the Court

of Appeals[.]” and “the written waiver did not suggest that defendant waived his right to appellate counsel[.]” *citing Thomas*, 34 N.Y.3d at 559-600); *Yizgar*, 240 A.D.3d at 416 (“The court properly explained defendant’s right to counsel on appeal, and did not imply that by waiving appeal, defendant would forfeit his right to appellate counsel for claims that survived the waiver”).

All told, defendant waived his right to appeal knowingly, voluntarily, and intelligently.

POINT II

Defendant's Appeal Waiver And Lack Of Standing Foreclose Review Of His *Bruen* Claim. In Any Event, Defendant Had No Second Amendment Right To Carry An Unlicensed Gun In Public (Answering Defendant's Brief, Point I).

As part of his omnibus motion, defendant moved to dismiss the indictment on the ground that, in *Bruen*, the Supreme Court had struck down New York's entire firearm licensing scheme, thereby precluding his prosecution under Penal Law §§ 265.03(3), 265.01(1), and 265.01-b(1) (Affirmation of Samantha Tucker, Esq., Mar. 7, 2023 (Tucker Aff.), ¶ 10; defendant's Memorandum of Law (DMOL): 10-15). The People opposed (People's Memorandum of Law in Opposition, Mar. 27, 2023 (PMOL)). Defendant now protests the court's denial of his motion (Decision and Order of Hon. Guy H. Mitchell, Apr. 14, 2023 (Order)), but he has presented no ground for relief.

First, as defendant must acknowledge, this Court has repeatedly held that a waiver of appeal encompasses claims that *Bruen* precluded prosecution for gun possession (DB: 15). In any event, the motion court properly determined that, because by his own admission defendant never applied for a gun license, he has no standing to challenge his prosecution for possessing an unlicensed firearm. Further, contrary to defendant's appellate claim, *Bruen* concerned only one small piece of New York's gun licensing scheme and did not legalize unlicensed possession of a firearm.

A. This Court Has Repeatedly Held That Appeal Waivers Encompass *Bruen* Claims.

This Court has repeatedly held that a valid appeal waiver forecloses review of claims that *Bruen* rendered a prosecution unlawful. *See People v. Tariq Gouldbourne*, ___ A.D.3d ___, 2025 WL 2956442 (1st Dept., Oct. 21, 2025); *People v. Velardo*, 228 A.D.3d 520, 520 (1st Dept. 2024), *lv. denied* 42 N.Y.3d 930 (2024); *Williams*, 227 A.D.3d at 481; *Castillo*, 226 A.D.3d at 574; *People v. Johnson*, 225 A.D.3d 453, 453-55 (1st Dept. 2024) (*citing inter alia People v. David*, 41 N.Y.3d 90 (2023)), *lv. granted* 42 N.Y.3d 939 (2024). There is no reason to accept defendant’s invitation to revisit that determination.

Indeed, the Court of Appeals has held that *Bruen* claims are not the type of “nonwaivable” “mode of proceedings” errors that are exempt from the preservation requirement. *See David*, 41 N.Y.3d at 95-98; *People v. Cabrera*, 41 N.Y.3d 35, 42-51 (2023). There is no principled reason that a Second Amendment claim can be forfeited by lack of a specific objection but cannot be waived.

While defendant cites the Fourth Department’s contrary holding,⁵ he concedes that this Court has rejected the Fourth Department’s analysis (DB: 16). This Court reasoned that a *Bruen* claim does “not go to the heart of the adjudicative process, and plainly does not do so any more than the host of constitutional claims that have been held waivable on appeal. Thus, there is no principled reason to conclude that defendant’s claim cannot be waived.” *Johnson*, 225 A.D.3d at 455. This Court should

⁵ *See People v. Benjamin*, 216 A.D.3d 1457 (4th Dept. 2023).

continue to follow its precedent and hold that defendant's appeal waiver forecloses his *Bruen* claim.

B. Defendant Lacks Standing To Challenge The State's Firearm Licensing Laws.

This Court has repeatedly held that, for a defendant to have standing to challenge the State's firearm-licensing provisions, he typically must have actually applied for a license. *See, e.g., People v. Joel R.*, ___ A.D.3d ___, 2025 WL 2832082 (1st Dept., Oct. 7, 2025); *People v. Alvarez*, 233 A.D.3d 619, 619 (1st Dept. 2024), *lv. denied* 43 N.Y.3d 961 (2025) (Troutman, J.); *Johnson*, 225 A.D.3d at 453, *citing United States v. Decastro*, 682 F.3d 160, 164 (2d Cir. 2012); *People v. Jackson*, 225 A.D.3d 547, 548 (1st Dept. 2024), *lv. denied* 41 N.Y.3d 1002 (2024) (Garcia, J.); *People v. Maldonado*, 230 A.D.3d 1069, 1070 (1st Dept. 2024), *lv. denied* 42 N.Y.3d 1053 (2024) (Rivera, J.).

Defendant acknowledges that he never applied for a firearm license (DB: 10; *see* DMOL: 12). Accordingly, as the court below correctly found, defendant "has not shown that he had submitted to the challenged policy by applying for a license in the first instance[.]" he "lacks standing" to challenge the state's firearm-licensing laws (Order: 3, *citing Decastro*, 682 F.3d at 164; *see* PMOL: 10, 16-21).

It is axiomatic that, generally, a person may not challenge the constitutionality of a regulatory scheme without first making a good faith effort to "submit to the challenged policy." *Decastro*, 682 F.3d at 164; *see Allen v. Wright*, 468 U.S. 737, 746, 755 (1984); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-68 (1972). The circumstances at hand only demonstrate the soundness of the rule. After all, in *Bruen*, other than

invalidating the requirement that an applicant show “proper cause” for the issuance of a permit to carry a concealed weapon in public, the Supreme Court left the remainder of New York’s gun-licensing statutes intact. It would be anomalous to permit defendant to challenge his conviction on the pretense that the proper cause requirement might have barred him from receiving a firearm license, when other, constitutionally-sound reasons might have barred him as well.

Defendant insists that his prosecution was “directly traceable” to the proper-cause requirement and that the record “fails to show that any lawful restrictions could have barred” him “from obtaining a license[.]” noting that he “had no prior criminal convictions and that he was over the age of 21” (DB: 14). However, as the People observed below, there are a number of additional requirements before a firearm license may issue (PMOL: 12). Foremost, an applicant is required to undergo a background check to, among other things, ascertain that all statements made on an application are true. Moreover, a license will not issue to anyone: convicted of, or with an outstanding warrant for, a felony or serious offense; who is a fugitive from justice; who unlawfully uses controlled substances; or who has not stated whether he has a history of mental illness. *See* Penal Law § 400.00(1). Relatedly, as the People observed below, the proper-cause requirement also pertained to only a single type of gun license—one to carry a concealed weapon in public. *See* Penal Law § 400.00(2)(f) (2022).

Accordingly, the court below found that defendant had failed to make a “substantial showing” that “constitutionally defective provisions” alone would have

resulted in denial of an application for any firearm license, rendering an application “futile” (Order: 2-3, *citing Decastro*, 682 F.3d at 164). Although a showing of futility might have excused defendant’s failure to apply for a license, he had “not shown that he could have overcome the constitutionally permissible restrictions in the licensing provisions left standing” after *Bruen* (Order: 3). *Compare People v. Martin*, 241 A.D.3d 1211 (1st Dept. 2025) (the “defendant’s contention that standing is established in the absence of any attempt to obtain a license in New York because such an attempt would have been futile is speculative and unavailing”) *with Joel R.*, ___ A.D.3d ___, 2025 WL 2832082 (holding in the alternative that, although the defendant “had standing to assert his Second Amendment challenge because, at 18 years of age, it would have been futile for him to apply for a license reserved for those 21 years old or older[.]” the “defendant has failed to establish that his conviction is unconstitutional under *Bruen*[.]” *citing People v. Tarazona*, 239 A.D.3d 544, 545 (1st Dept. 2025)).

Defendant’s reliance on the First Amendment case of *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969), as well on Judge Rivera’s lone dissent in *People v. Garcia*, 41 N.Y.3d 62, 74 (2023) (which inaptly relied on *Shuttlesworth*, as well as *Staub v. City of Baxley*, 355 U.S. 313 (1958)), is misplaced. In *Shuttlesworth*, the Court reversed the conviction of a Black minister for leading a peaceful civil rights protest, in 1963 Alabama, without obtaining a permit. The court ruled that the minister could challenge his conviction for violating Alabama’s blatantly unconstitutional permitting law, which gave the city

“virtually unbridled and absolute power” to prohibit demonstrations, thus violating “the right of free expression.” *Id.* 148-51.

There are critical differences between the First Amendment claim in *Shuttlesworth* and the Second Amendment claim that defendant raises here. As explained in Part C, *infra*, the Supreme Court held in *Bruen* that the right to bear arms is afforded only to law-abiding citizens; it can be denied to people whose backgrounds indicate that their possession of a weapon endangers the public. By contrast, a predicate felon or domestic abuser cannot be subjected to a background check before being allowed to speak. A person whose freedom of speech is restricted by an unconstitutional licensing regime need not, therefore, submit to the licensing process to challenge it. On the other hand, because a state may permissibly impose rules about who may own a gun, a prospective gun owner is required to submit to the process—including a full background check—before asserting his Second Amendment rights in court. Indeed, the plaintiffs in *Bruen* did just that.

Simply put, a prior restraint on speech is a rare exception to the nation’s tradition of free expression. See *Shuttlesworth*, 394 U.S. at 150-51; *Staub*, 355 U.S. at 325; accord *Lovell v. Griffin*, 303 U.S. 444 (1938) (ordinance requiring a permit to distribute literature was facially invalid, because it “strikes at the very foundation of the freedom of the press...”). Gun licensing, by contrast, is historically permissible, as *Bruen* recognized.

Defendant’s reliance on and *Smith v. Caboon*, 283 U.S. 553 (1931), is similarly misplaced. That case dealt with a facially-invalid commercial regulation that lacked the

public-safety implications of a gun-licensing scheme. *See Smith*, 283 U.S. at 562. Indeed, New York has a strong, legitimate interest in keeping unlicensed, unregulated firearms off the streets. If a person wishes to obtain a firearm—and if they believe that New Yorks’ gun regulations are unconstitutional—they should seek to obtain a gun by lawful means, including by filing a civil suit if necessary. Under no circumstances should they be permitted to obtain a gun illegally and carry an unlicensed, loaded firearm in public, as defendant did here.

In short, defendant could have applied for a gun license and submitted to a full background check. If his license application was denied, he could have filed a civil suit challenging the determination—like the plaintiffs in *Bruen*. Instead, he took the law into his own hands and obtained a firearm illegally and carried it in public. To countenance such lawless conduct endangers public safety and defies the state’s “reasonable, well-defined restrictions” on gun possession. *Bruen*, 597 U.S. at 70.

Defendant instead asks this Court to act as a *de facto* licensing board—a task that the criminal and appellate courts are not well situated to perform. This Court should enforce the standing rule, because otherwise individuals will feel empowered to carry loaded guns on the street—without ever submitting to a background check—and then ask permission from the court later. Neither the Second Amendment nor *Bruen* permits such lawlessness, which would pose a grave danger to public safety.

C. The Supreme Court’s Decision In *Bruen* Did Not Prevent Defendant’s Prosecution For Carrying An Unlicensed Gun In Public.

Even if defendant’s Second Amendment claim were reviewable, it would fail. The Supreme Court has long held that states may require gun owners to obtain a license, and *Bruen* did not alter that rule. Indeed, *Bruen* invalidated only one aspect of New York’s scheme: the “proper cause” requirement for obtaining a concealed-carry permit. The Court left the remainder of New York’s gun licensing rules undisturbed. Therefore, defendant was properly prosecuted for possession of a firearm without a license.

1. New York’s Gun Licensing Scheme

Under New York law, it is illegal to possess an unlicensed firearm. The degree of crime depends on various factors, including whether the firearm is loaded, whether it is possessed outside one’s home or place of business, and whether the defendant harbors the intent to use it unlawfully. *See* Penal Law § 265.01 *et seq.* Pertinent here, possession of a loaded firearm outside one’s home or place of business constitutes a class C violent felony offense. Penal Law §§ 70.02(1)(b) and 265.03(3).

A person may avoid criminal liability for possessing a firearm if he or she has a valid New York gun license. Penal Law § 265.20(3). To obtain a license, an applicant must submit to an investigation, and the licensing officer must find that “all statements in a proper application for a license are true.” Penal Law § 400.00(1). The applicant must be 21 years of age or older and of good moral character. Penal Law § 400.00(1)(a)-

(b). An applicant may be disqualified if, among other things, he or she has a prior conviction for a felony or other serious offense, has an outstanding warrant for a felony or serious offense, is a fugitive from justice, has a history of mental illness, or has an outstanding order of protection—or if other “good cause” exists for denying the license. Penal Law § 400.00(1)(c)-(n).

Previously, New York had required applicants for a concealed carry permit to show “proper cause.” *See* Penal Law § 400.00(2)(f) (former). The courts defined “proper cause” as “a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.” *Matter of Klenosky v. New York City Police Dept.*, 75 A.D.2d 793 (1st Dept. 1980), *aff’d*, 53 N.Y.2d 685 (1981). That provision, however, was invalidated by *Bruen* before defendant’s arrest and thus is not relevant to the case at hand.

After defendant’s arrest, the Legislature added new requirements to obtain a concealed carry permit: an applicant must, among other things, submit to an expanded background check, provide character references, and complete a firearms training course. Penal Law § 400.00(1)(o).

2. Aside From The Defunct “Proper Cause” Requirement, *Bruen* Did Not Invalidate The Remainder Of New York’s Gun Licensing Scheme.

The Supreme Court has never held that a person has the right to possess an unlicensed firearm. In *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), the Court held that the District of Columbia’s complete “ban on handgun possession in the home

violate[d] the Second Amendment, as [did] its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.” In *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010), the Court applied this right to possess a firearm to the states.

Critically, in *Heller*, the Court made clear that “the right secured by the Second Amendment is not unlimited.” *Heller*, 554 U.S. at 626. Instead, the right to keep and bear arms is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Id.* For instance, “nothing” in the *Heller* decision “should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.” *Id.* Further, the Second Amendment does not prohibit localities from enacting “laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 626-27. The *Heller* Court “identif[ied] these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.” *Id.* at 627 n.26; accord *McDonald*, 561 U.S. at 786.

Bruen did not disturb those holdings. The plaintiffs in *Bruen*—“law-abiding, adult citizens” of New York State—challenged the former “proper cause” requirement for the issuance of a concealed carry permit. *Bruen*, 597 U.S. at 15. Both individual plaintiffs submitted to—and passed—background checks and were issued restricted licenses. But they were denied full concealed carry permits because they had not demonstrated a special need to carry a concealed weapon in public. *See id.* In a fact-specific ruling,

the Supreme Court held that the Second Amendment protects the right to carry a weapon in public for self-defense, which may not be conditioned on “demonstrating to government officers some special need.” *Id.* at 70.

The Court did not disturb any other aspect of New York’s gun licensing scheme. In fact, it reiterated that the Second Amendment right was subject to “well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms.” *Bruen*, 597 U.S. at 38. Instead, in invalidating New York’s “proper cause” requirement, the Court focused on the level of discretion conferred on licensing officers. It observed that 43 states issued “concealed-carry licenses whenever applicants satisfy certain threshold requirements, without granting licensing officials discretion to deny licenses based on a perceived lack of need or suitability.” *Id.* at 2123. The Court declared that nothing in its “analysis should be interpreted to suggest the unconstitutionality of the 43 States’ ‘shall-issue’ licensing regimes, under which a general desire for self-defense is sufficient to obtain a [permit].” *Id.* at 2138 n.9 (internal quotation omitted). The Court emphasized that the regimes of the 43 other states, “which often require applicants to undergo a background check or pass a firearms safety course,” were not unconstitutional, as they were “designed to ensure only that those bearing arms in the jurisdiction are, in fact, ‘law-abiding, responsible citizens.’” *Id.* (quoting *Heller*, 554 U.S. at 635).

Concurring in *Bruen*, Justice Kavanaugh (joined by the Chief Justice) observed that “the Court’s decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense.” *Bruen*, 597 U.S. at 79 (Kavanaugh, J., concurring). Justice Kavanaugh remarked that New York may continue to require licenses for carrying handguns for self-defense so long as it “employ[s] objective licensing requirements like those used by the 43 shall-issue States.” *Id.* at 80. Citing *Heller*, Justice Kavanaugh observed that “the Second Amendment allows a variety of gun regulations,” including “prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 81 (Kavanaugh, J., concurring) (internal quotation marks omitted).

Justice Alito echoed those sentiments, observing that the Court had not “disturbed anything that we said in *Heller* or *McDonald*...about restrictions that may be imposed on the possession or carrying of guns.” *Bruen*, 597 U.S. at 72 (Alito, J., concurring). Justice Alito added that the *Bruen* “holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun.” *Id.*

Thus, the Supreme Court’s opinion in *Bruen*—along with concurring opinions joined by three of the six Justices in the *Bruen* majority—make clear that New York may continue to require that a person obtain a license to purchase or possess a firearm and a concealed carry permit to carry a handgun in public. The state merely may not require

a concealed carry permit applicant to show a “special need” to carry a firearm for self-defense. In all other respects, the Court left New York’s licensing scheme undisturbed.

3. Defendant’s Conviction Is Consistent With *Bruen*.

Hence, defendant wrongly asserts that *Bruen* rendered the entirety of New York’s gun licensing scheme unconstitutional. Instead, *Bruen* invalidated only a small part of New York’s licensing scheme: the former proper cause requirement for obtaining a concealed carry permit. That requirement was irrelevant to defendant’s conviction for weapon possession, because it was removed from the statute before defendant’s arrest. Moreover, defendant failed to establish that he met the threshold requirements for obtaining *any* sort of New York gun license, much less a concealed carry permit. Indeed, unlike the plaintiffs in *Bruen*, defendant never submitted to—or passed—a background check.

Further, in *Heller* and *Bruen*, the Supreme Court made clear that only “law-abiding, responsible citizens” have the right to bear arms. *Bruen*, 597 U.S. at 38 n.9; *Heller*, 554 U. S. at 635. Here, defendant was charged not only with simple weapon possession but also with harboring an intent to use the firearm unlawfully and with possessing a firearm that had been defaced. *See* Penal Law §§ 265.01(2), 265.02(3), 265.03(1)(b). Given that gun licensing in general is permissible, defendant was not permitted to carry a *defaced* weapon, as he did here, nor was he entitled to possess a gun with the intent to use it unlawfully. Indeed, that is inconsistent with being a law-abiding citizen.

There is also no merit to defendant's unpreserved challenge, in a cursory footnote, to the good moral character requirement for obtaining a gun license (DB: 14, fn.4). That requirement has been upheld, as New York courts have interpreted it narrowly as a proxy for being a law-abiding citizen. *See Caputo v. Kelly*, 117 A.D.3d 644, 644-45 (1st Dept. 2014). That, of course, is consistent with *Bruen*. *See Antonyuk v. James*, 120 F.4th 941, 981 (2d Cir. 2024) (upholding "good moral character" requirement as "a proxy for dangerousness"); *Sanicola v. City of New York*, 224 A.D.3d 578, 579 (1st Dept. 2024) (gun license applicant failed to establish good moral character in light of domestic violence incidents, orders of protection entered against him, and his "lack of candor and concern for the safety of others"); *see also People v. Martinez*, 238 A.D.3d 423, 424 (1st Dept. 2025) (defendant's challenges to New York's licensing statute, including his attack of the "good moral character" provision, were "unavailing"); *People v. Guzman*, 237 A.D.3d 570, 571 (1st Dept. 2025) (same), *lv. denied* ___ N.Y.3d ___, 2025 WL 2935326 (2025) (Cannataro, J.); *People v. Watts*, 234 A.D.3d 620, 621 (1st Dept. 2025) (same), *lv. denied* 43 N.Y.3d 1059 (2025) (Wilson, J.).

Finally, defendant ignored the state's licensing process by, among other things, failing to undergo a simple background check. That neutral licensing requirement is permissible after *Bruen*, and defendant's failure to abide by it vitiated any Second Amendment rights he might have had.

In sum, contrary to defendant's claim—which he also lacks standing to raise—*Bruen* did not prevent his prosecution for carrying an unlicensed, defaced firearm.

Indeed, defendant’s conduct indicated that he was not a law-abiding citizen entitled to the protection of the Second Amendment. And certainly, the “proper cause” requirement—which had been invalidated by *Bruen* and therefore removed from the statute before defendant’s arrest—had nothing to do with his conviction for possessing an unlicensed firearm. *Bruen* left the remainder of New York’s weapon possession laws intact, as this Court has repeatedly held. *See, e.g., People v. Bailey*, 234 A.D.3d 560, 561 (1st Dept. 2025), *lv. denied* 43 N.Y.3d 1044 (2025); *People v. Liriano*, 226 A.D.3d 520, 520 (1st Dept. 2024), *lv. denied* 41 N.Y.3d 1019 (2024); *Johnson*, 225 A.D.3d at 455; *see also People v. Chase*, 223 A.D.3d 913, 913 (2d Dept.), *lv. denied* 41 N.Y.3d 982 (2024).

Accordingly, defendant was properly prosecuted for carrying an unlicensed, defaced firearm.

POINT III

Defendant Waived Any Challenge To The Severity Of His Just, Negotiated Sentence (Answering Defendant's Brief, Point II).

Defendant's waiver of appeal forecloses review of the severity of his sentence. *See Thomas*, 34 N.Y.3d at 560. Indeed, below, defendant explicitly waived the right to challenge his sentence as excessive (P7-8; Waiver). Nonetheless, defendant asks this Court either to reduce his probationary term to the statutory minimum of three years or order his sentence discharged (DB: 16-18). *See* Penal Law § 65.00(3). However, the sentencing court rightly imposed, and defendant understandably agreed to, a term of five years' probation. *See id.*

To be sure, this Court has “broad, plenary power” to modify a sentence. *See People v. Brisman*, 43 N.Y.3d 322, 324 (2025), *quoting People v. Delgado*, 80 N.Y.2d 780, 783 (1992). However, sentencing courts are recognized generally “to be in a superior position to dispense proportionate and fair punishment.” *See People v. Day*, 73 N.Y.2d 208, 212 (1989), *citing People v. Farrar*, 52 N.Y.2d 302, 305-06 (1981); *see also People v. Junco*, 43 A.D.2d 266, 268 (1st Dept. 1974) (“a trial court is in the most advantageous position to determine the proper sentence, having observed the defendant and being intimately familiar with the facts and circumstances underlying the conviction” (internal citation omitted)), *aff'd* 35 N.Y.2d 419 (1974). And, this Court is to modify sentences only in the interests of justice when the sentence is “unduly harsh or severe.” *See* CPL § 470.15(6)(b).

Furthermore, as a general rule, when a “defendant effects a plea bargain and receives the precise sentence that was promised, he should not later be heard to complain that he received what he bargained for.” *People v. Fair*, 33 A.D.3d 558, 558 (1st Dept. 2006) (internal quotation and citation omitted). Indeed, “important goals of fairness and finality in criminal matters are accomplished only insofar as the parties are confident that the carefully orchestrated bargain of an agreed-upon sentence will not be disturbed as a discretionary matter[.]” *See People v. Lopez*, 6 N.Y.3d 248, 255-56 (2006) (internal quotation and citation omitted). Guided by these standards, there is no basis to reduce defendant’s negotiated sentence.

Having possessed a loaded, operable firearm, defendant faced between 3 ½ and 15 years in prison. *See* Penal Law §§ 70.02(1)(b), (3)(b); 265.03. Even the attempt offense to which defendant pled guilty was punishable by between two to seven years’ imprisonment. *See* Penal Law §§ 70.02(1)(c), (3)(c); 110.00; 265.03. In turn, there is no wonder defendant agreed to a sentence that spared him any prison time.

Moreover, although the instant conviction represents defendant’s first, possession of a loaded, semi-automatic weapon can hardly be shrugged off as youthful folly. Notably, the weapon had apparently been defaced—with an unfinished frame and no serial number (PSR: 3)—to prevent it from being traced. *See* Penal Law § 265.02(3). The gun also had a threaded barrel that could accept a silencer, flash suppressor, or foregrip (PSR: 3). By recklessly carrying such a weapon in his pocket, defendant created a “potential for dangerous consequences to himself and the

community” and “pose[d] a potential risk to public safety” (*Id.*: 8). Notably, the Probation Department recommended that defendant serve a split sentence including at least some jail time (*Ibid.*).

Observing that this is his first offense and his history of steady employment, and claiming “family support[,]” defendant insists that he has demonstrated that he can be a “responsible, law-abiding citizen” and that continued supervision of him is “simply a waste of state resources” (DB: 16, 20). As the plea court recognized, defendant was offered a non-jail sentence precisely because of his gainful employment and lack of criminal history (P2). And, defendant should not be heard to claim that he demonstrated an ability to be a law-abiding citizen, when despite steady employment and family ties, he went about armed on a public street. Moreover, as noted, the negotiated sentence of five years’ probation was a lenient disposition. Given defendant’s conduct, ensuring that he does not reoffend—and providing supportive supervision—is a worthy investment.

Finally, it is true that a court may terminate probation at any time. *See* CPL § 410.90(1). However, a court “shall” grant such a request only upon findings: that a defendant is “no longer in need of such guidance, training or other assistance which could otherwise be administered through probation supervision”; that he has “diligently complied with the terms and conditions of probation”; and that termination of probation is “not adverse to the protection of the public.” *See* CPL § 410.90(3). The present record does not reflect, for instance, whether defendant has been “diligently

comp[lying]” with the terms of probation. This and other factual questions concerning such a request are better weighed in the first instance by the sentencing court.

In sum, defendant waived review of the severity of his negotiated sentence, which in any event is just. Indeed, defendant received leniency for entering a negotiated plea, and his agreed-upon sentence was eminently reasonable.

POINT IV

Defendant's Challenges To The Conditions Of His Probation Are Unavailing (Answering Defendant's Brief, Point IV).

Finally, below, defendant made no protest concerning the conditions of probation imposed by the court. Now, defendant protests many of those conditions on a variety of grounds. However, defendant has failed to identify any basis for relief.

A. Defendant Waived His Constitutional Challenges To Probation Conditions 7 and 24 And Has Failed To Provide A Sufficient Record to Review His Claim That They Are Not Reasonably Necessary To Ensure He Leads A Law-Abiding Life.

In imposing probation conditions, the sentencing court scrupulously observed the requirements of CPL § 410.10(1) by giving defendant a written copy of the conditions. The written form, which defendant signed, explained defendant's probation conditions in detail, including his right to contest any alleged violation of probation and his right to assigned counsel and a hearing (Probation Form: 3). No further oral or written pronouncement was required. Indeed, CPL § 410.10(1) specifies that it is "not necessary to specify the conditions orally." *See People v. Scott*, 226 A.D.3d 443, 444 (1st Dept. 2024) ("That the court did not orally pronounce" the probation conditions was permissible where defendant was given a written copy), *lv. denied* 42 N.Y.3d 930 (2024).

As a condition of his probation, the court required defendant to "[a]void injurious or vicious habits" and "unlawful or disreputable" persons and places (Condition 7) and to refrain from wearing or displaying gang "paraphernalia" or

associating with gang members (Condition 24). Below, defendant agreed without protest to abide these conditions (Probation Form: 3). Yet, now, defendant claims that these conditions are unconstitutionally vague and overbroad, infringe on his “association rights[,]” and have “no connection” to his case (DB: 26, 28-35).

As a threshold matter, defendant’s appeal waiver forecloses review of his constitutional challenges. *See People v. Lance Lombard*, ___ A.D.3d ___, 2025 WL 2698091 (1st Dept., Sept. 23, 2025); *People v. Lowndes*, 239 A.D.3d 574, 575 (1st Dept. 2025). Further, his constitutional claims are unpreserved, because they were not raised below. *See People v. Choncey Chance*, ___A.D.3d___, 2025 WL 2857066, *1 (1st Dept., Oct. 9, 2025) (vagueness and First Amendment constitutional challenges to probation Condition 7 unpreserved); *People v. Vasquetelles*, 241 A.D.3d 1208 (1st Dept. 2025) (constitutional challenges to probation conditions required preservation); *Lowndes*, 239 A.D.3d at 575 (constitutional as-applied challenges to probation Condition 7 under the First Amendment and the due process vagueness doctrine unpreserved).

Preservation aside, it was not improper for the court to impose Conditions 7 and 24, which defendant willingly accepted when he signed the acknowledgment form below. Condition 7, requiring defendant to avoid vicious habits and disreputable persons and places, is explicitly authorized by Penal Law § 65.10(2). Hence, the condition was imposed “in accordance with statutory requirements.” *People v. Samms*, 95 N.Y.2d 52, 55-56 (2000). It should not be stricken absent some indication in the record that it was improper. *Contrast Samms*, 95 N.Y.2d at 55-56 (“Defendant’s sentence,

imposed in violation of this statutory mandate, was unauthorized”); *People v. Fuller*, 57 N.Y.2d 152, 156 (1982) (striking probation conditions improperly imposed by Probation rather than the sentencing court, because a defendant has the right to be “sentenced as provided by law”).

To the extent that this Court has held that such a claim survives an appeal waiver, *see, e.g., Lombard*, ___ A.D.3d ___, 2025 WL 2698091; *Lowndes*, 239 A.D.3d at 575, that does not excuse defendant’s failure to create a record on which to review his complaints. As far as defendant’s constitutional claims, if defendant had raised them below, it would have provided the Attorney General an opportunity to weigh in on the matter. *See* Executive Law § 71(3). Moreover, defendant could have explained, for instance, exactly with whom he felt the provisions would prevent him from associating. Similarly, the sentencing court would have had an opportunity to place on the record its rationale for imposing the conditions.

It is not uncommon for probation conditions to be challenged before a lower court and then appealed. That, of course, is the preferred procedure for presenting claims to an appellate court. *See, e.g., People v. McNair*, 87 N.Y.2d 772, 774 (1996) (striking improper probation condition on appeal, which defendant had challenged when his probation was revoked); *People v. Romanelli*, 188 A.D.3d 1354, 1354 (3d Dept. 2020) (finding no abuse of discretion by the sentencing court in imposing conditions over the defendant’s objections); *People v. Myatt*, 248 A.D.2d 68, 70-71 (3d Dept. 1998)

(rejecting the defendant's argument under CPL § 440.20 that his probation condition was unauthorized).

Simply put, by failing to object and in fact accepting the conditions below, defendant left the record inadequate to permit meaningful appellate review. *See People v. Kinchen*, 60 N.Y.2d 772, 773-74 (1983) (although the defendant's claim that he had been deprived of his right to counsel did not have to be preserved, that did not "dispense with the need for a factual record sufficient to permit appellate review"). On the existing record, defendant's arguments are unavailing. Carrying a loaded firearm is hardly innocuous conduct. Moreover, as discussed *supra*, defendant's weapon appeared to have been defaced so that it could not be traced and was capable of accepting a silencer or flash suppressor. Defendant obtained the weapon from someone of manifestly criminal bent. Accordingly, the court understandably sought to keep defendant from "frequent[ing] places where crime or criminals abound[.]" *See People v. Johnson*, 118 Misc.2d 983, 985 (Crim. Ct., Queens County 1983). Relatedly, the court understandably barred defendant from associating with a particular subset of "disreputable" persons—gang members.

All told, defendant has presented no basis to strike Conditions 7 and 24. At the very least, this Court should require further development of the record before striking the conditions.

B. Defendant's Failure To Create A Proper Record Has Deprived The Court Of A Basis To Assess His Complaints About Other Conditions Of Probation.

Defendant's failure to create a record below has likewise deprived this Court of the ability to adequately assess his complaints about other challenged probation conditions. In fact, it is not even clear that those complaints are ripe for review. For instance, defendant complains that, although he reported no substance-abuse issues (PSR: 3-5), the sentencing court ordered that, if so directed by Probation, he should submit to alcohol and drug testing (Condition 15) and undergo substance-abuse treatment (Condition 23).

However, if defendant had made a timely objection, the sentencing court could have explained its imposition of the conditions. Perhaps the court viewed the conditions as useful precautions in case Probation uncovered, or defendant developed, substance-abuse issues while on probation. In such a circumstance, directing defendant to undergo treatment and testing would, presumably, be a preferable alternative to, say, violating him for failing to lead a law-abiding life. Conversely, had defendant objected, he might have convinced the court to strike the condition.

In any event, the record provides no indication that Probation has actually directed defendant to submit to either drug-testing or treatment. Thus, it is not clear that defendant has been tangibly aggrieved. *See Texas v. United States*, 523 U.S. 296, 300 (1998) ("a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all"); *Church of St. Paul & St.*

Andrew v. Barnwick, 67 N.Y.2d 510 (1986) (if “the anticipated harm is insignificant, remote, or contingent...controversy is not ripe” for judicial review); *Sullivan v. N.Y. State Comm’n on Public Ethics*, 207 A.D.3d 117, 131 (3d Dept. 2022) (*citing Church of St. Paul & St. Andrew, supra*).

Relatedly, defendant complains that the court “carelessly” imposed a host of other conditional requirements that seemingly do not apply to him at all, but rather to, for instance, sex offenders, or a defendant against whom an order of protection has been issued (DB: 29). Again, if defendant had raised objection below, the court might either have explained that, as a precautionary measure, it routinely imposes those conditions or struck them as inapplicable. However, as noted the requirements appear to be conditioned on realities that largely do not apply to him, and thus, defendant can identify no justiciable grievance.

In addition, defendant complains that the court directed him: to support any dependents and meet “other family responsibilities” (Condition 14), although he asserts that he has no dependents (PSR: 4); to, if he was under 21 years of age, follow Probation guidance as to residence and education (Condition 17), although he was 25 at the time of the plea (PSR: 1); to follow any order of protection (Condition: 18), although none had been issued; to perform community service for a designated agency, although none was, in fact, specified (Condition 19); and to, if convicted of a sex offense, avoid school facilities (Condition 20) and comply with the Sexual Offender Registration Act (SORA) (Condition 21), although he is not a sex offender (*see* DB: 29). By their terms, those

conditions do not appear to apply to defendant, because he has not met the prerequisites; therefore, he has not been aggrieved by them. Certainly, defendant has not shown, on this record, that he has been aggrieved by those conditions.

Raising a claim for the first time on appeal is not the optimal way for a defendant to challenge a probation condition when it is not clear from the record (1) whether it applies to him or (2) whether he has been aggrieved by it. Instead, the more sensible path is for the defendant to return to the court that imposed the conditions. CPL § 410.20(1) provides that the sentencing court may modify or eliminate probation conditions “at any time prior to the expiration or termination of the period of the sentence.” *See also* CPL § 410.90 (providing for termination of probation, under certain conditions); Penal Law § 60.01(2)(b) (providing for the modification of a probation sentence). Thus, as defendant acknowledged below when accepting the conditions, he may move the sentencing court at any time to modify the conditions of probation (Probation Form: 3). And, if defendant followed that path, it would create an adequate record to permit meaningful appellate review, which is lacking here.

In short, defendant has failed to develop a record supporting modification of his probation conditions.

C. The People Take No Position With Respect To Defendant’s Request To Strike Condition 10.

Finally, defendant contends that the condition of probation requiring him to pay the mandatory surcharge and fees is not reasonably necessary to ensure he leads a law-

abiding life and that the condition is in conflict with CPL § 420.35(1), which authorizes jailing any defendant for up to 15 days to compel payment of the surcharge and fees (DB: 25-26).

Contrary to defendant's argument, there is nothing unlawful about conditioning probation on a defendant's payment of the surcharge and fees. *See* Penal Law §§ 65.10(1), (2)(1); *People v. Bailey*, 181 A.D.3d 1243, 1244-45 (4th Dept. 2020) ("the court did not err in revoking [the defendant's] probation based on his failure to pay the surcharge within the time required by the terms of his probation"); *see generally* *People v. Jones*, 26 N.Y.3d 730, 735 (2016) (noting that the surcharges and fees help fund "important criminal justice and victim services").

However, in light of defendant's limited means, and in an exercise of prosecutorial discretion, the People take no position with respect to defendant's request to strike the condition (PSR: 9). *See People v. Percy*, 234 A.D.3d 619, 620 (1st Dept. 2025) (striking the condition as not reasonably related to the defendant's rehabilitation in light of his indigency, relatively minor criminal history, and substance-abuse issues, despite a valid appeal waiver, in the absence of opposition from the People).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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October 29, 2025

PRINTING SPECIFICATIONS STATEMENT

The word count for this brief is 9,980, 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. The brief is printed in Garamond, a serified, proportionally spaced typeface. The type size is 14 points in the text and headings, and 13 points in the footnotes.

To be argued by

RINA V. DeFRANCESCO

TIME REQUESTED: 15 MINUTES

New York Supreme Court

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Appellate Division—First Department

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- *against* -

Bronx County
Ind. No. 70327/23
ACN: 2023-03397

MATA BALOGH,

Defendant-Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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November 6, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT IN REPLY.....	1
ARGUMENT IN REPLY	1
POINT I.....	1
The purported appeal waiver does not bar Mr. Balogh’s constitutional claim.	1
POINT II	2
The law is clear that preservation is not required for Mr. Balogh to challenge conditions of probation as not reasonably related to his rehabilitation.	2
CONCLUSION	3
PRINTING SPECIFICATIONS STATEMENT	1A
AFFIRMATION OF SERVICE OF BRIEF ON DISTRICT ATTORNEY	2A

TABLE OF AUTHORITIES

FEDERAL CASES

<i>New York State Rifle & Pistol Ass’n v. Bruen</i> , 597 U.S. 1 (2022)	1
---	---

STATE CASES

<i>People v. Alvarez</i> , 233 A.D.3d 619 (1st Dep’t 2024)	2
<i>People v. Arias</i> , 210 A.D.3d 593 (1st Dep’t 2022)	2
<i>People v. Dranchuk</i> , 203 A.D.3d 741 (2d Dep’t 2022)	2
<i>People v. Elvin</i> , 2025 NY Slip Op. 06031 (1st Dep’t, Oct. 30, 2025)	2
<i>People v. Hall</i> , 228 A.D.3d 466 (1st Dep’t 2024)	2
<i>People v. Johnson</i> , 225 A.D.3d 453 (1st Dep’t 2024), <i>lv. granted</i> , 42 N.Y.3d 939 (2024)	1
<i>People v. Percy</i> , 234 A.D.3d 619 (1st Dep’t 2025)	2
<i>People v. Rivera</i> , 239 A.D.3d 521 (1st Dep’t 2025)	2
<i>People v. Vasquetelles</i> , 2025 Slip Op. 05198 (1st Dep’t, Sept. 30, 2025)	2

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

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THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- :

MATA BALOGH, :

Defendant-Appellant. :
-----X

STATEMENT IN REPLY

In support of the March 20, 2025 appellant’s brief (“AB”), Mr. Balogh replies to the respondent’s October 29, 2025 brief, Points II and IV (“RB”).

ARGUMENT IN REPLY

POINT I

The purported appeal waiver does not bar Mr. Balogh’s constitutional claim.

For all the reasons in his opening brief, Mr. Balogh maintains that the purported appeal waiver in this case is not valid (AB: 22-26), but regardless, an appeal waiver does not bar his claim that the indictment against him for illegally possessing a firearm without a license is unconstitutional under *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022) (AB: 15-16). The appeal stemming from this Court’s decision to the contrary was argued in the Court of Appeals on October 14, *People v. Johnson*, 225 A.D.3d 453 (1st Dep’t 2024), *lv. granted*, 42 N.Y.3d 939 (2024), and a decision is expected within the coming weeks, likely during this Court’s December Term.

POINT II

The law is clear that preservation is not required for Mr. Balogh to challenge conditions of probation as not reasonably related to his rehabilitation.

Respondent's argument that Mr. Balogh should have "created a record below" and "made a timely objection" is just a roundabout way to claim that Mr. Balogh's challenge to certain of his probation conditions needed to be preserved to be raised on appeal (RB: 39-41). Such an argument is unavailing. As was addressed in Mr. Balogh's main brief (AB: 36), this Court and others have consistently found that preservation is not required to challenge conditions of probation as unrelated to the probationer's rehabilitation and has decided many cases on its own without such a "proper record" (RB: 39). *See, e.g., People v. Elvin*, 2025 NY Slip Op. 06031, at *1 (1st Dep't, Oct. 30, 2025); *People v. Vasquetelles*, 2025 Slip Op. 05198, at *1 (1st Dep't, Sept. 30, 2025); *People v. Rivera*, 239 A.D.3d 521, 522 (1st Dep't 2025); *People v. Percy*, 234 A.D.3d 619, 620 (1st Dep't 2025); *People v. Alvarez*, 233 A.D.3d 619, 620 (1st Dep't 2024); *People v. Hall*, 228 A.D.3d 466, 467 (1st Dep't 2024); *People v. Arias*, 210 A.D.3d 593, 594 (1st Dep't 2022); *People v. Dranchuk*, 203 A.D.3d 741, 742 (2d Dep't 2022).

CONCLUSION

For the reasons stated herein and in the opening brief, this Court should vacate the conviction and dismiss the indictment. In the alternative, this Court should reduce Mr. Balogh's sentence in the interest of justice and should strike the illegitimate probation conditions.

Respectfully submitted,

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November 6, 2025

PRINTING SPECIFICATIONS STATEMENT

This brief was prepared in Microsoft Word, using a 14-point Garamond font. It totals 413 words.

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

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THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, : Bronx County

Ind. No. 70327/23

-against- : ACN: 2023-03397

MATA BALOGH, :

Defendant-Appellant. :

-----X

AFFIRMATION OF SERVICE OF BRIEF ON DISTRICT ATTORNEY

RINA V. DeFRANCESCO, an attorney duly admitted to the practice of law in this State, does hereby affirm and show:

That on November 6, 2025, the within reply brief for defendant-appellant was served upon Hon. Darcel D. Clark, District Attorney, Bronx County, by emailing a copy to appellatebriefs@bronxda.nyc.org, the email address designated by her and consented to by her for that purpose.

I affirm this 6th day of November, 2025, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

Dated: New York, New York
November 6, 2025

Rina V. De Francesco

Rina V. DeFrancesco