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COURT OF APPEALS
STATE OF NEW YORK

JOHNSON (OMAR),

Appellant,

-against-

PEOPLE,

Respondent.

NO. 86

20 Eagle Street
Albany, New York
October 14, 2025

Before:

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

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Chrishanda Sassman-Reynolds
Official Court Transcriber

1 CHIEF JUDGE WILSON: Next case on the calendar is
2 People v. Omar Johnson.

3 MR. RUTKIN-BECKER: Good afternoon. Benjamin
4 Rutkin-Becker - - -

5 CHIEF JUDGE WILSON: Give counsel just a second
6 to sit down there.

7 Go ahead.

8 MR. RUTKIN-BECKER: Good afternoon.

9 Benjamin Rutkin-Becker, Center for Appellate
10 Litigation, on behalf of Omar Johnson. I'd like to reserve
11 five minutes for rebuttal, please.

12 CHIEF JUDGE WILSON: Okay.

13 MR. RUTKIN-BECKER: This court should review Mr.
14 Johnson's preserved Second Amendment challenge and reverse
15 his conviction. To begin, this court should hold that Mr.
16 Johnson's claim presents a nonwaivable issue.

17 JUDGE HALLIGAN: Counsel on that question. You
18 know, I struggle to make sense of the exceptions in
19 Seaberg, and maybe you can help explain why you think they
20 weigh in favor of finding a waiver here nonappealable. I
21 think perhaps we could set to the side challenges to the
22 voluntariness of the waiver, because that, I think, has to
23 do with capacity, perhaps so too, with competence.

24 And if we look instead, there's double jeopardy,
25 right? Which - - - in which a waiver is enforceable. And

1 that arguably goes to the power of the court and its
2 ability to exercise that power on the defendant in front of
3 it. Right?

4 On the other hand, illegality of a sentence is
5 something for which you can proceed notwithstanding a
6 waiver.

7 But when you look at the cases that Seaberg cites
8 for that proposition, they actually look to me like they
9 are cases that sound in coram nobis and have to do more
10 with collateral relief. So what is your best case for the
11 proposition that just as there was, you know, by analogy,
12 there was - - - there was nonwaivability there, there
13 should be here.

14 MR. RUTKIN-BECKER: Right. So I can answer that
15 in a few parts, Your Honor. First, I think I agree the
16 court has articulated the standard in several different
17 ways since Seaberg, but all sides appear to agree here that
18 really the core of it is public interest. And so I think
19 People v. Muniz is a helpful starting point in that regard,
20 that claims are nonwaivable where they, quote, "implicate a
21 public policy consideration that transcends the individual
22 concerns of a particular" - - -

23 JUDGE HALLIGAN: But the only case I can find
24 where we have actually held a case non - - - an issue
25 nonwaivable on that basis, is speedy trial, right? That's

1 - - - that's, I think, Blakely. Am I right about that?

2 MR. RUTKIN-BECKER: You're right. You're right.

3 JUDGE HALLIGAN: Right? And there the court says
4 the public interest is so strong that it may even be in
5 opposition to the defendant's interest. Right? I'm not
6 sure that that's so with respect to a constitutional
7 challenge.

8 MR. RUTKIN-BECKER: To clarify my - - -my answer,
9 Your Honor. Blakely is - - - that is the constitutional
10 speedy trial case.

11 JUDGE HALLIGAN: Yeah.

12 MR. RUTKIN-BECKER: But that's not the only case
13 that has invoked the public interest. Rudolph is a recent
14 example of this court invoking the public interest to say
15 that the public has such an interest in courts making a
16 determination as to whether a young person is going to have
17 a conviction for life, that that is a nonwaivable issue.

18 And so that is the standard that has most
19 recently been cited by this court.

20 JUDGE HALLIGAN: I thought maybe Rudolph turned
21 more specifically on the statute issue there, but perhaps
22 I'm not correctly recalling it.

23 MR. RUTKIN-BECKER: That's the Attorney General's
24 argument here, Your Honor, but that's not what Rudolph
25 says. Rudolph says that this is the - - - it's in the

1 public interest. And the court later confirms that Rudolph
2 did, in fact, hold that that claim that a court failed to
3 make a youthful offender determination - - -

4 JUDGE HALLIGAN: I take your point that there's a
5 public interest, and I'm sure there is, in - - - in
6 understanding whether a statute is constitutional or
7 unconstitutional. But Seaberg also seems to me to suggest
8 that there's a pretty significant thumb on the scale, if
9 you will, in finding appeal waivers enforceable. So I - -
10 - I'm trying to understand what is - - - what is it
11 specifically public interest perhaps, one might think,
12 sweeps a little broadly. So what is it specifically about
13 the constitutional challenge?

14 MR. RUTKIN-BECKER: Right. So that's where I - -
15 - I - - - again, I think Muniz is helpful because it talks
16 about public policy that transcends the individual concerns
17 of a particular defendant to obtain review.

18 So if you take double jeopardy, for example,
19 really that is a pretty individualized claim that one
20 person cannot be prosecuted again for the same conduct.

21 JUDGE HALLIGAN: So would you include, then, an
22 as-applied challenge?

23 MR. RUTKIN-BECKER: I would personally, Your
24 Honor, because I think any - - - that is a line that this
25 court could draw, if Your Honor is so inclined.

1 JUDGE HALLIGAN: And I assume a challenge, for
2 example, a vagueness challenge to - - - that's a
3 constitutional challenge to a statute?

4 MR. RUTKIN-BECKER: That's right. And I - - - I
5 think even as-applied challenges are going to have that
6 public policy consideration that transcends an individual
7 just asking for appellate review. But a constitutional - -
8 -

9 CHIEF JUDGE WILSON: But I guess the question
10 though is what - - - maybe part of the question is whether
11 a facial challenge has a greater public policy interest
12 behind it?

13 MR. RUTKIN-BECKER: I think Your Honors could
14 certainly draw that conclusion. I personally would not. I
15 think even an as-applied challenge. Right? It - - - it's
16 not just - - - it's not ordinarily as specific as just one
17 individual's conduct. I think any constitutional challenge
18 to a Penal Law provision concerns the behavior that anyone
19 in society can engage in without the threat of criminal
20 prosecution. And it - - -

21 JUDGE HALLIGAN: I looked to see whether there
22 were any cases in which we had addressed the enforceability
23 of an appeal waiver on a constitutional challenge from
24 Seaberg to the present. It's a lot of time that's passed.
25 I couldn't find anything, and I don't think I saw something

1 in your briefs. But it's a little surprising to me, I
2 guess, that this would not have come up in the meantime.
3 It - - - maybe you have some sense of why that is?

4 MR. RUTKIN-BECKER: I don't, Your Honor. I don't
5 know why that answer isn't - - - it's never been given by
6 this court. It could be as simple as leave not being
7 granted on that issue in the past. It's certainly an issue
8 that has split the departments as we all note in our
9 briefs.

10 JUDGE HALLIGAN: But very recently, I think. The
11 two cases? I think this one and Benjamin are of very
12 recent vintage. Right?

13 MR. RUTKIN-BECKER: They are of recent vintage.
14 But we cite in our briefs, cases from - - - you know, over
15 time where the departments have reached different
16 conclusions as to this. The appellate term, Second
17 Department found these issues nonwaivable, I believe, about
18 a decade or more ago. The First Department itself found
19 that these issues were nonwaivable in *People v. Pimental*.

20 JUDGE CANNATARO: You say "these issues", just so
21 I'm clear, you mean constitutional issues?

22 MR. RUTKIN-BECKER: Not constitutional issues
23 broadly speaking, Your Honor. Constitutional challenges to
24 Penal Law statutes. And I think in this particular
25 context, the fairness and finality interests that generally

1 do, counsel and - - - you know, this court has cited to
2 find that in addition to - - -

3 JUDGE CANNATARO: What Penal Law statute are you
4 attacking here on a constitutional basis?

5 MR. RUTKIN-BECKER: We're attacking the weapon
6 possession, 265.03. There was an allegation here that - -
7 -

8 JUDGE CANNATARO: You're saying that statute is
9 unconstitutional?

10 MR. RUTKIN-BECKER: That prosecuting Mr. Johnson
11 for - - - for exercising his Second Amendment rights was
12 unconstitutional in this case. That was the claim made
13 below.

14 JUDGE CANNATARO: Because of an unconstitutional
15 licensing regime?

16 MR. RUTKIN-BECKER: Right. So - - -

17 JUDGE CANNATARO: So you're not really attacking
18 the Penal Law, are you?

19 MR. RUTKIN-BECKER: We're - - - it is a challenge
20 to this prosecution on Second Amendment grounds. It's not
21 - - - the argument is not that there can be no valid
22 prosecution under 265.03; that is correct. But this is - -
23 -

24 JUDGE HALLIGAN: But you're arguing no
25 prosecution for possession of a gun under the licensing

1 regime that was in place prior to the adoption of the new
2 regime in September of '22, yes?

3 MR. RUTKIN-BECKER: That's correct, Your Honor.

4 And so as to the waivability issue, that
5 implicates anybody's in society's rights to public carry in
6 New York.

7 JUDGE RIVERA: Then why does it not fall within
8 the Second Circuit's distinction about a - - - a challenge
9 that traces back to the Penal Law versus a challenge that
10 traces back to something else?

11 MR. RUTKIN-BECKER: I believe that's a - - - a
12 question about standing, Your Honor, just to clarify.

13 JUDGE RIVERA: Yes, yes, yes.

14 MR. RUTKIN-BECKER: And happily move on to that.

15 So the Second Circuit's holding in Decastro is
16 not the operative case here. The - - - this falls within
17 the long line of Supreme Court precedents: Shuttlesworth,
18 Staub, and Smith, that hold that an individual does not
19 need to subject themselves to an unconstitutional licensing
20 standard before they can invoke the unconstitutionality of
21 that in a criminal prosecution.

22 I think all sides would clearly agree that
23 there's injury, in fact, here. And what Mr. Johnson
24 alleged below is that he couldn't be prosecuted simply for
25 failing to submit to this unconstitutional requirement.

1 That's exactly what he alleged. He noted that on A-12 - -
2 - A-18, that he had a Second Amendment right, that the
3 prosecution could not show that he had been disqualified
4 from exercising this right, and that it was impossible for
5 him to engage in public carry under the licensing
6 provisions at that time.

7 JUDGE RIVERA: What - - - did he specifically
8 state that it was the section that Bruen struck down that
9 was the basis for the unconstitutionality?

10 MR. RUTKIN-BECKER: So he did, throughout the
11 motion practice, cite the invalidation of proper cause.

12 JUDGE RIVERA: Right.

13 MR. RUTKIN-BECKER: But I'll note that on A-16 he
14 also - - - he cited to the fact that the Supreme Court's
15 issue with the licensing scheme in Bruen was the unfettered
16 discretion conferred upon licensing officials, which was -
17 - -

18 JUDGE HALLIGAN: But I take it your argument on
19 the motion to dismiss - - - I know you had more detailed
20 arguments. I know your light is on, if I - - - if I may,
21 Chief?

22 I know you had more detailed arguments that you
23 raised later on in the Appellate Division, but was
24 essentially that, because the regime as it - - - the
25 scheme, as it stood when your client was arrested and

1 charged, included the proper cause requirement and that
2 requirement was invalidated, that that tainted the entire
3 licensing scheme and any CPW conviction as well. Is that a
4 fair characterization?

5 MR. RUTKIN-BECKER: In large part, I agree with
6 that characterization, but I think the claim was a bit more
7 specific than that, insofar as Mr. Johnson argued that he
8 had a Second Amendment right that he could raise as a
9 defense. And so since the Cabrera litigation and those
10 cases that Your Honor has heard prior, these motions are
11 being made in trial courts across the state. And it is
12 very common and not at all burdensome for the prosecution
13 to respond to these motions by making arguments that the
14 individual before them, either because of their conduct
15 with the weapon or because of their record, could not
16 actually raise a Second Amendment defense. That they did
17 not have that right.

18 That simply was not done here. There was really
19 no - - - it was really not disputed what Mr. Johnson
20 alleged that he had - - - he had this right and that but
21 for proper cause he would - - - he could - - - excuse me.
22 That proper cause was the reason why he was being
23 prosecuted, that he could not satisfy that standard.

24 CHIEF JUDGE WILSON: Where - - -

25 MR. RUTKIN-BECKER: All of - - -

1 CHIEF JUDGE WILSON: Where would the burden to
2 establish that defense rest?

3 MR. RUTKIN-BECKER: So I think the initial burden
4 when attacking a statute's constitutionality is for the - -
5 - on the defense to meet with the preponderance standard.
6 But Bruen makes very clear that once there is a Second
7 Amendment issue, once there - - - when there's a statute
8 that regulates second - - - conduct under the Second
9 Amendment, and I think there's no contest that that's what
10 we have here, it's - - - the burden switches to the
11 prosecution to justify the regulu - - - regulation under
12 the historical tradition test.

13 And the prosecution said absolutely nothing about
14 the historical underpinnings of the licensing regimes here.
15 All the prosecution said below was, I think, the - - - not
16 contested, not truly notable fact that some licensing can
17 be constitutional. But it doesn't follow that New York had
18 a constitutional licensing scheme at the time. And there -
19 - - it - - -

20 CHIEF JUDGE WILSON: I guess, let me see if I can
21 - - - with the specifics. So suppose - - - not talking
22 about this case, but one of the other many cases you
23 mentioned - - -

24 MR. RUTKIN-BECKER: Yes.

25 CHIEF JUDGE WILSON: - - - that are percolating



1 now in the trial courts. Suppose a defendant who had been
2 convicted of a felony previously and so was disabled under
3 that provision of the statute, raised a Second Amendment
4 claim, whose burden would it be then? Would it be the
5 defendant's to say I don't actually have a conviction, or
6 to say - - - to challenge the constitutionality of the ex-
7 felon licensing provision? Or would it be the People's
8 burden to prove that the defendant was disqualified under
9 some other portion?

10 MR. RUTKIN-BECKER: I think Bruen itself answers
11 that question, that the burden is on the prosecution to
12 justify the regulation at issue. And that is what's
13 happening in many cases that - - -

14 CHIEF JUDGE WILSON: And so the defendant does -
15 - - the defendant doesn't even have to say what part of the
16 licensing statute the defendant is challenging, just, "I
17 have a Second Amendment right". And then the prosecution
18 has to go through history and tradition for every element
19 of the statute?

20 MR. RUTKIN-BECKER: No, Your Honor. So - - -

21 CHIEF JUDGE WILSON: So then I don't understand.

22 MR. RUTKIN-BECKER: So the defendant does have to
23 - - - I think the defendant does have to specifically
24 allege what's unconstitutional, as we did here with proper
25 cause and also a reference to the discretion. In addition,

1 it's important to note that we have an explicit - - - an
2 explicit ruling here on A-39 where the trial court held no
3 other provision was called into question under Bruen - - -

4 JUDGE HALLIGAN: Why isn't there then a question
5 of severability? So if you focus on the proper cause
6 requirement, which is what I think you did in the motion to
7 dismiss, why isn't there a question of whether or not - - -
8 we know what the Supreme Court has said about that, right?
9 Bruen is pretty clear.

10 Why isn't there a question about whether that's
11 severable and whether or not the rest of the licensing
12 regime, and therefore the conviction, can stand? As
13 opposed to - - - I take it you're saying that the
14 invalidation of that requirement alone means that
15 everything else falls?

16 MR. RUTKIN-BECKER: So there is - - - there is
17 potentially a severability question at issue. I think at
18 the time that Mr. Johnson, right, was being prosecuted, he
19 was - - - he alleged below that he was being prosecuted
20 merely because he didn't have a license to engage in Second
21 Amendment protected conduct. And at the time - - - I think
22 it's important to understand the nature of the error
23 discussed in Bruen. That at the time of Mr. Johnson's
24 arrest, New York State simply didn't recognize this right
25 at all. So he had no lawful path to immunity here.

1 But even if this court were to find that proper
2 cause were severable, there's still a major issue here of
3 good moral character. Which at the time Mr. Johnson was
4 arrested, had - - -

5 JUDGE HALLIGAN: But you didn't challenge that in
6 - - - in the motion to dismiss, I don't think. I don't
7 think you focused on that specifically until your Appellate
8 Division brief, but maybe I missed the reference.

9 MR. RUTKIN-BECKER: So what we have here,
10 certainly at a minimum, is a general objection to the
11 entire licensing scheme once again specifically citing the
12 unfettered discretion as the basis for why the licensing
13 scheme was unconstitutional. And we have an explicit
14 ruling on A-39 that every other provision in New York State
15 was similar to the "shall issue" regimes that Bruen
16 approved of.

17 And good moral character, I agree, is not
18 preserved for this court's review as an initial matter, but
19 it's certainly relevant to understanding the trial court's
20 decision. And there was no record support for that finding
21 that no other provisions were called on - - - into question
22 after Bruen, particularly where, again, the entire
23 licensing scheme was put at issue here. The prosecution,
24 and then the trial court, did not apply Bruen at all. They
25 just simply said it didn't address any of these questions,

1 didn't apply the historical tradition test, and had that
2 test been applied, it - - - that finding really cannot be
3 supported, because - - -

4 CHIEF JUDGE WILSON: I'm not sure - - - I'm still
5 not sure what you mean by "the entire licensing scheme was
6 put at issue here". For example, the age requirement?

7 MR. RUTKIN-BECKER: So you're right. Not the age
8 requirement, Your Honor.

9 CHIEF JUDGE WILSON: But the question is how do
10 we tell what was and what wasn't?

11 MR. RUTKIN-BECKER: So again, Mr. Johnson alleged
12 that he was being prosecuted for exercising his Second
13 Amendment rights merely because he didn't have a license,
14 and that the licensing here had been found
15 unconstitutional, that the licensing scheme conferred
16 unfettered discretion - - -

17 JUDGE HALLIGAN: But - - -

18 MR. RUTKIN-BECKER: - - - to licensing officials.
19 And that proper cause, and in addition, good moral
20 character had that same issue. That at the time of Mr.
21 Johnson's arrest, his rights were not recognized by New
22 York State and were - - -

23 JUDGE CANNATARO: So you're saying when he
24 alleged unfettered discretion as the constitutional defect
25 in the licensing, he - - - that specifically referenced

1 proper cause and good moral character? Is it - - - is that
2 your argument?

3 MR. RUTKIN-BECKER: I think when you take that,
4 coupled with the court's express finding that every other
5 provision in New York State passed constitutional muster
6 without any application of Bruen's test at all, the lower
7 court's decision cannot be affirmed on appeal.

8 JUDGE CANNATARO: I'm just trying to understand
9 how you put the prosecution on notice of what in the regime
10 it had to defend? Or is it as was posited before, all he
11 has to do is say Second Amendment, and the prosecution then
12 has a obligation to defend every aspect of the statute?

13 MR. RUTKIN-BECKER: No. It's like - - - I think
14 what we're alleging is that he cannot be prosecuted merely
15 because he didn't submit to an unconstitutional regime, and
16 that he has a Second Amendment right that - - -

17 JUDGE HALLIGAN: Well, that first part, I think,
18 is maybe sounding in the standing argument, but I don't
19 understand. Maybe I'm just making the same point you've
20 heard. I don't understand how we are supposed to ascertain
21 exactly what aspects of the licensing regime - - - you have
22 said, I think, that it's not simply the case that if a
23 defendant invokes her Second Amendment rights, that then
24 the prosecution must defend by reference to history and
25 tradition, every single aspect of the licensing scheme.

1 And so if that's not the way it should proceed,
2 it seems like there has to be an explicit identification of
3 what aspects you are claiming are unconstitutional under
4 the Second Amendment. And I take it you're arguing that
5 the reference to unfettered discretion does that as Judge
6 Cannataro said, with respect to proper cause and good moral
7 character, but maybe nothing else?

8 MR. RUTKIN-BECKER: Yes. Your Honor, especially
9 - - - again, I - - - this might be a different case if the
10 trial court had simply said, right, there were no other - -
11 - this is just about proper cause, we find that that wasn't
12 applicable, or that he - - - you know. The court did, of
13 course, reach standing incorrectly by not - - - by
14 distinguishing *Shuttlesworth* and saying he still had to
15 satisfy the rest of the licensing requirements. But here
16 the court went one step further and said everything else
17 was fine under *Bruen*, when it had been signaled to the
18 trial court that *Bruen* was about more than proper cause,
19 *Bruen* was about unfettered discretion.

20 And really, it was for the court to apply *Bruen*'s
21 historical test if - - - at least to apply *Bruen*'s
22 historical test and need to go no further perhaps than to
23 say that only proper cause had been at issue there and that
24 wasn't enough. But the court said - - - ruled that
25 everything else was proper in New York's licensing scheme,

1 and that's a decision that cannot be affirmed on review.

2 CHIEF JUDGE WILSON: Thank you.

3 MR. RUTKIN-BECKER: Thank you.

4 MS. ALDRIDGE: Good afternoon. May it please the
5 court. Emily Anne Aldridge for the People.

6 There is no principled reason why a Second
7 Amendment challenge must be preserved but may not be
8 waived. Defendant made a knowing and voluntary choice to
9 waive a speculative Bruen claim in exchange for a favorable
10 deal.

11 Going to Your Honor's question regarding Seaberg
12 and the overwhelming theme there. So in Seaberg, the court
13 held, of course, that appeal waivers are generally valid,
14 and in Hidalgo further held that a waiver, a general appeal
15 waiver, covers all waivable claims. And Seaberg cited four
16 claims that survived the waiver, and they were ID'd for a
17 reason. Three went to the reliability of the factual
18 determination of guilt. So - - -

19 JUDGE HALLIGAN: But why isn't counsel correct
20 that there's a public interest in the facial
21 constitutionality of a statute, and that under Blakely,
22 that should be enough to exempt it from the waiver?

23 MS. ALDRIDGE: Because the court has looked at
24 the concern regarding - - - I'm going to quote here from -
25 - - from Seaberg, going specifically to the speedy trial

1 issue. "Trial delay may result in the loss of evidence or
2 an accused's inability to respond to criminal charges,
3 thereby compelling innocent persons to plead guilty out of
4 necessity. Because of the societal interest, a defendant
5 may not waive such a claim. That's from pinpoint page 9 of
6 the court's decision.

7 So the court has made clear, and it also goes
8 into involuntary pleas and incompetency that, again, it's
9 looking at the adjudicative process of determining guilt or
10 innocence.

11 CHIEF JUDGE WILSON: But why wouldn't you - - -
12 why couldn't you say the same thing about an
13 unconstitutional licensing scheme? That there are some
14 people who met the other requirements but couldn't show
15 proper cause, had a gun, and were convicted, and that
16 forced an innocent person under a constitutional standard
17 to plead guilty?

18 MS. ALDRIDGE: Well, the constitutionality - - -
19 this court has ruled many times that constitutional issues
20 may be waived. But more important, if the defendant wishes
21 to raise these claims on appeal, that is part of the
22 negotiation process.

23 CHIEF JUDGE WILSON: Well, that would be true if
24 you could say that for illegal sentence as well.

25 MS. ALDRIDGE: Well, this is not an illegal

1 sentence claim.

2 CHIEF JUDGE WILSON: I understand that, but we've
3 said that those are not waivable.

4 MS. ALDRIDGE: Well, but also this court looks to
5 - - -

6 CHIEF JUDGE WILSON: Why are they not waivable?

7 MS. ALDRIDGE: Well, here there's a danger of
8 conflating a constitutional issue with an illegal sentence
9 and claims - - - and it's essential to be sentenced as
10 provided by law. And obviously, there's no preservation
11 required there, but the court - - -

12 CHIEF JUDGE WILSON: But why is that obvious?

13 MS. ALDRIDGE: Oh, but - - - because that is what
14 this court has held in Seaberg and - - -

15 CHIEF JUDGE WILSON: I guess I'm trying to get to
16 the theoretical underpinning. Right? It seems to me that
17 there's at least an argument that the reason that you can't
18 waive an illegal sentence is because the state is not
19 authorized to punish you in that way.

20 And you could say the same thing about a statute
21 that is facially unconstitutional?

22 MS. ALDRIDGE: But here the court does - - - but
23 the court does have the power to decide a constitutional
24 question. And that was before the court here, this
25 constitutional question regarding the Second Amendment.

1 This court has found that they can - - - the defendants can
2 waive claims under the Fourth Amendment, the Fifth
3 Amendment. There's wide variety of claims. And even going
4 back to Your Honor's question regarding the illegal
5 sentence - - -

6 CHIEF JUDGE WILSON: Well, do you know if we've
7 said you - - - you can waive a facial Fourth Amendment
8 claim as opposed to an as-applied?

9 MS. ALDRIDGE: I'm - - - I'm honestly - - -

10 CHIEF JUDGE WILSON: You know, for example, a
11 statute that says you don't have to have a warrant to go
12 into people's homes to take things?

13 MS. ALDRIDGE: Well, that would - - - that would
14 certainly raise - - -

15 CHIEF JUDGE WILSON: That's a facial violation, I
16 would think?

17 MS. ALDRIDGE: Yes. That would certainly raise
18 significant constitutional - - -

19 CHIEF JUDGE WILSON: But could you - - - could
20 you - - - is there a - - - do we have a case that says you
21 can waive that kind of a claim?

22 MS. ALDRIDGE: Well, I - - - I don't believe that
23 that sort of claim - - - that is obviously a very different
24 situation. I understand - - -

25 JUDGE HALLIGAN: But - - - but why is that? I



1 mean, your adversary argues - - - set aside the merits for
2 a minute. But your adversary argues that the licensing
3 regime and any attendant CPW conviction is blatantly
4 unconstitutional under Bruen. How is that different than
5 the hypothetical that the Chief Judge is positing, which is
6 there's a statute enacted that is blatantly
7 unconstitutional?

8 It seems to me that either they're both waivable
9 or neither one is.

10 MS. ALDRIDGE: Well, there - - - respectfully,
11 there is a difference just by nature of - - - as Your Honor
12 was indicating earlier when - - - when speaking to my
13 adversary, regarding the severability. So - - -

14 JUDGE HALLIGAN: But - - - but - - -

15 MS. ALDRIDGE: - - - whether the - - -

16 JUDGE HALLIGAN: - - - this - - - if I can? The
17 Supreme Court, I think, indicated in Bruen that the Second
18 - - - rights that - - - that are conferred by the Second
19 Amendment have to be given the same degree of respect that
20 any other constitutional right does. So I think the
21 severability question, perhaps, is a - - - is a question
22 about the merits and whether or not invalidating the proper
23 cause requirement then causes everything else to fall as
24 well. But I think the question of the appeal waiver is
25 different.

1 So would you say that the hypothetical the Chief
2 asked you about, is that waivable?

3 MS. ALDRIDGE: Well, I bring up the severability
4 issue only to say that the - - - the Chief's question
5 involves a - - - it's a blanket ban, but that's not what's
6 happening here. That's the only reason I - - -

7 JUDGE HALLIGAN: I understand. But I think - - -
8 well, probably one of three things has to be correct,
9 right? Either, all facial constitutional claims are
10 waivable; the Chief's example, this case, anything else;
11 none of them are waivable; or perhaps maybe, there's some
12 way to distinguish between them, although I don't know what
13 it is. So I'm just looking to understand what your
14 position on that is.

15 MS. ALDRIDGE: Well, the Second Circuit recently
16 in the Thompson decision actually addressed some of this
17 question. And there they said the question is not whether
18 defendants have a right not to be convicted of a
19 nonexistent offense. It's a question whether defendants,
20 in exchange for valid consideration, are permitted to
21 execute a binding - - -

22 JUDGE HALLIGAN: So is your view, then, that all
23 facial constitutional challenges are waivable?

24 MS. ALDRIDGE: Well, all constitutional
25 protections are subject to well-defined restrictions, and

1 there's no reason to exempt - - -

2 JUDGE HALLIGAN: I'm sorry. I think that's
3 probably a yes or no question. Either they're all waivable
4 or they're not all waivable.

5 MS. ALDRIDGE: Well, they certainly do not - - -
6 they're not covered by the Seaberg carve-outs. But to the
7 extent there is a glaring constitutional issue that it - -
8 - that comes up at some other points, the court can then
9 use adjudicative powers there. In fact - - -

10 JUDGE HALLIGAN: But wait. So that suggests that
11 - - - that blatant constitutional - - - you know, if you
12 have a really good constitutional challenge, then that
13 can't be waived. But if it's a constitutional challenge
14 where we sort of peek at the merits and we think maybe it
15 succeeds, maybe it doesn't? I'm - - - I - - - I - - - I'm
16 not sure I understand your position.

17 MS. ALDRIDGE: Well, here, I think there is a
18 difference in something that imposes a blanket ban as the
19 Chief referenced, and here - - -

20 JUDGE HALLIGAN: So if New York passed a statute
21 saying that no one in the state other than a law
22 enforcement officer may possess a gun in their home or
23 receive a carry license, period. Blanket ban. Would that
24 be - - - would a constitutional challenge to that be
25 waivable on an - - - on appeal or not?

1 MS. ALDRIDGE: I mean, that would certainly fly
2 in the face of - - - of the court's decision in Heller.

3 JUDGE HALLIGAN: But would the appeal waiver be
4 enforceable or no?

5 MS. ALDRIDGE: That would be up to the court to
6 decide. I'm inclined to say that would - - -

7 JUDGE HALLIGAN: Sure. But I'm just asking you
8 for your view on the question.

9 MS. ALDRIDGE: I'm inclined to say that - - -
10 that in a - - - such a - - - a blanket - - - such - - - I'm
11 sorry. In such a bold-faced situation, it would be
12 different, but again, the question here is - - -

13 JUDGE RIVERA: Well, see that's the problem.
14 You're getting to the merits. Waivers are not about the
15 merits. Right? If you've waived a claim, no one looks at
16 what the merits are. So I understand your answer to be,
17 well, if it looks like you'd succeed, if it really is a
18 constitutional violation, no, you can never waive that.
19 But that's exactly what he's arguing. This is a
20 constitutional violation; therefore, it can't be waived.

21 MS. ALDRIDGE: But the appeal right is no more
22 fundamental than the right to all sorts of rights that
23 defendants waive, even in the plea context regarding the
24 jury trial, the Fifth Amendment.

25 JUDGE HALLIGAN: But then why wouldn't that be

1 true across the board, including in the blanket context
2 that I gave you or the Chief gave you?

3 MS. ALDRIDGE: Well, in the case where a
4 defendant still wishes to plead guilty and still wishes to
5 - - - and there is a part of the negotiating process, which
6 then serves - - -

7 JUDGE HALLIGAN: Let's assume the defendant - - -
8 let's assume that the waiver is clear, freely agreed to,
9 and includes an appeal waiver. I thought I heard you say
10 that a - - - you know, a blanket restriction on some
11 conduct that that appeal waiver is not enforceable, but in
12 some other circumstances, it is if we're talking about a
13 constitutional challenge. And I'm trying to understand
14 where you would draw that line and why?

15 MS. ALDRIDGE: I just know that the court can
16 assess what's necessary to facilitate meaning - - -
17 meaningful appellate review should those situations apply.
18 But I would also - - -

19 JUDGE HALLIGAN: But that's what your adversary
20 is saying is true here, right? Your adversary is saying
21 that this is a - - - you know, facial constitutional
22 challenge, at least as it applies in this window of time to
23 - - - you know, to guns, and that the appeal waiver is
24 therefore not enforceable.

25 MS. ALDRIDGE: Well, I'd also point out to - - -

1 to a large extent, this court already answered many of
2 these questions in its holding in Carrera by finding - - -

3 JUDGE HALLIGAN: That's about preservation, which
4 is distinct, I think, from the question of whether an
5 appeal waiver is enforceable.

6 MS. ALDRIDGE: It is. But our position is that
7 if - - - if it requires preservation, there's no logical -
8 - -

9 JUDGE CANNATARO: So what's your best
10 articulation of what is the throughline between waivable
11 and not waivable in our jurisprudence?

12 MS. ALDRIDGE: Whether it goes to the process of
13 determining factual guilt or innocence. So for example, in
14 the speedy trial context, as I noted Seaberg notes that the
15 delay could then cause someone to plead - - - a factually
16 innocent person from pleading guilty in the cases regarding
17 involuntary - - - involuntariness and incompetence, it's -
18 - - it's same, similar type of concerns.

19 But here the only question for this court to
20 consider is whether defendant could make a rational
21 decision to waive his claim in exchange for this offer. He
22 had a - - -

23 JUDGE RIVERA: I don't understand that at all.
24 I'm not trying to be cute about it. I just don't
25 understand the distinction you're drawing. People - - - I

1 mean, it's documented. People take pleas and waive their
2 rights even when they're completely innocent. So you could
3 argue that he was innocent.

4 MS. ALDRIDGE: Well, here, to the extent that he
5 was interested in preserving any - - - any rights for
6 further review as part of the negotiation process, he could
7 have sought a carve-out. In the case - - -

8 CHIEF JUDGE WILSON: But that seems like it goes
9 too far, because that would apply to any type of claim.
10 You could always say even with an illegal sentence or - - -
11 you know, anything, you could say, well, this is a good
12 bargain, so I'm going to take it.

13 MS. ALDRIDGE: And that is - - - that would be
14 part of a discussion with - - - with competent counsel.
15 But to the extent he may have wanted - - -

16 JUDGE RIVERA: Well, no. But you agree that
17 there are certain rights that one cannot waive, correct?

18 MS. ALDRIDGE: Absolutely. As recognized by this
19 court in Seaberg.

20 CHIEF JUDGE WILSON: Even if you - - - if you're
21 going to - - -

22 JUDGE RIVERA: And so you can't be in that
23 negotiation over something you can - - - or well, I guess,
24 you could negotiate it, but it's not going to stand up.
25 Why would the prosecutor engage in such a negotiation?

1 MS. ALDRIDGE: Absolutely. I - - - I'm sorry. I
2 may have misspoke earlier. Yes. No. Certainly, we're not
3 looking to go against this court's - - - the court's core
4 holdings in Seaberg. But to the extent that a defendant
5 does wish to preserve this claim for appeal, he can seek a
6 carve-out.

7 In fact, in this court's decision that addressed
8 whether the constitutionality of the statutes survives a
9 guilty plea, this court specifically referenced a case in
10 which someone had sought.

11 And I would also just note that this - - - to the
12 extent that there is this split, the First Department and
13 the Second Department are both in agreement regarding the -
14 - - whether this can be waived. The Third Department has
15 not addressed this issue, but they have - - - they ruled
16 that it was doubtful that a challenge to the
17 constitutionality of a statute would fall within the narrow
18 category surviving an appeal waiver. And again - - -

19 JUDGE RIVERA: So your white light is on. You
20 want to address the other issues other than waivability?

21 MS. ALDRIDGE: Absolutely, yes.

22 So the defendant deprived the state of an
23 opportunity to assess his eligibility for a license. And
24 permitting such an end run incentivizes gun owners to flout
25 licensing laws, increasing risk to public - - - to the

1 public and of gun-related violence.

2 Bruen specifically said states can have a
3 licensing scheme and the defendant shouldn't be able to
4 raise his challenge without first trying to go through this
5 lawful process. The state has a compelling interest in
6 completing the background check. The Second Amendment is
7 limited to as - - - as explained by the Supreme Court
8 repeatedly, the Second Amendment is a right for law-
9 abiding, responsible people. And here defendant had - - -
10 he was caught. This case came up. He was caught with a
11 gun in the midst of a domestic violence investigation. He
12 had a armed robbery conviction out of Georgia. He - - -

13 JUDGE RIVERA: What would have been the point of
14 applying for the license if you're arguing he never would
15 have gotten it?

16 MS. ALDRIDGE: Well, it's still - - - that's - -
17 - to not require someone to go through the process has
18 significant public safety implications, as Your Honor noted
19 in the Garcia dissent. By choosing not to apply for a
20 permit, he deprives the state of an opportunity to assess
21 his eligibility for a license. Permitting this end run
22 incentivizes gun owners to flout the licensing law,
23 increasing the risk to the public of gun-related violence.
24 Same thing applies here.

25 CHIEF JUDGE WILSON: So what do you think he put

1 at issue? Just the proper cause requirement? Proper cause
2 - - -

3 MS. ALDRIDGE: Yes.

4 CHIEF JUDGE WILSON: - - - plus good moral
5 character? Everything in the statute? And what if he - -
6 - what do you think - - - how do you think this is supposed
7 to work? Not in this case, but in a future case?

8 MS. ALDRIDGE: In - - - well, in this particular
9 case, and certainly there are defendants who put other
10 things in the statute here, he only puts the proper cause
11 requirement in. And - - -

12 CHIEF JUDGE WILSON: And so where would that
13 leave us if we were to get to the merits?

14 MS. ALDRIDGE: Well, the proper cause requirement
15 is easily severable from the remainder of the statute. In
16 fact, the legislature made very clear its desire to exempt
17 this - - - that portion by rewriting the statute and not -
18 - - rather than striking down all of gun licensing rules,
19 upholding the remainder.

20 JUDGE HALLIGAN: But he was subjected to it, and
21 so I think his argument is that - - - if we were to reach
22 the merits, his argument is the Supreme Court has said it's
23 invalid. I think that's correct. And so since it was part
24 of the licensing scheme and the licensing - - - and having
25 a license is an affirmative defense to the - - - to the

1 offense that he can't - - - his conviction can't stand.

2 MS. ALDRIDGE: Well, the - - - by the time he was
3 arrested, the - - - I'm sorry, may I answer?

4 CHIEF JUDGE WILSON: Of course.

5 MS. ALDRIDGE: By the time he was arrested, the
6 statute had already been - - - the Supreme Court had
7 already struck down - - -

8 JUDGE HALLIGAN: Yes, that's correct.

9 MS. ALDRIDGE: - - - and it was simply awaiting
10 the - - -

11 So here - - - he didn't even apply - - - and here
12 we're also talking about just the - - - the proper cause
13 for concealed carry. This is a defendant who never even
14 went through the process of applying for even a restricted
15 license. And had he - - - and that was something that was
16 noted by the court in its decision denying his dismissal
17 motion.

18 So the proper cause requirement wouldn't have
19 even been a factor. And especially given his - - - his
20 background, the state - - - the safety interests require
21 that he go through the process and that litigants should
22 not be subject to self-help remedies to the detriment of
23 public safety. To the extent that any individual does want
24 to challenge the constitutionality of the gun license or
25 process, they should go through the process and do - - -



1 and if it doesn't go their way, they should do what the
2 plaintiffs in Bruen did and apply civilly rather than
3 endanger public safety.

4 CHIEF JUDGE WILSON: Thank you.

5 MS. ALDRIDGE: Thank you.

6 MR. KELLER: May it please the court. Matthew
7 Keller, for the Attorney General in defense of the statute.

8 I'd like to address the court's questions in
9 terms of what - - - what, I guess, is the order of
10 importance. Turning to the appeal - - -

11 JUDGE HALLIGAN: Would you start - - - yeah. On
12 the appeal waiver, what is your response to the question of
13 whether all facial constitutional challenges are subject to
14 waiver, including some, you know, blanket ban that might
15 appear blatantly unconstitutional?

16 MR. KELLER: I - - - we think that they're all -
17 - - that they're all - - - this court should find that
18 they're all waivable.

19 JUDGE HALLIGAN: They all rise or fall together?

20 MR. KELLER: They all rise or fall together. But
21 I will note, I think that there's only a facial challenge
22 preserved here, and so the court doesn't really need to
23 reach that issue. There's only one type of claim that's
24 preserved here. In terms of - - - you know, where - - -

25 CHIEF JUDGE WILSON: I'm sorry. I'm not - - - I

1 don't think I followed that.

2 MR. KELLER: Well - - - well, he - - - he
3 challenged - - -

4 CHIEF JUDGE WILSON: No, no, I understand there's
5 only a facial claim here, but why wouldn't we have to reach
6 the question of whether a facial claim survives a waiver?

7 MR. KELLER: Oh, I think you have to reach that
8 question, Chief Judge. I - - - what I meant was the
9 distinction between facial challenges and as-applied
10 challenges. I don't think it's necessary to confront the
11 distinction because the distinction isn't presented here.

12 JUDGE HALLIGAN: But I took - - - I took - - -

13 MR. KELLER: There's not both types of claims
14 raised.

15 JUDGE HALLIGAN: I took the People to be
16 suggesting that, perhaps where there was a blanket ban that
17 would not be subject to a waiver, but some other set of
18 facial challenges would be waivable. And I take it you're
19 saying every facial challenge is subject to a waiver,
20 regardless of its apparent merits if we were to peek at
21 them.

22 MR. KELLER: Yeah. That's our position now.
23 It's important to note and - - - and - - -

24 CHIEF JUDGE WILSON: So facial - - - so New York
25 passes a law saying it's a criminal offense for an African-

1 American person to vote and somebody is prosecuted, they
2 can waive that?

3 MR. KELLER: No, Your Honor. That's not our
4 position. But that is not this case - - -

5 CHIEF JUDGE WILSON: Well, that's - - - I
6 understand.

7 MR. KELLER: - - - because he is not challenging
8 - - -

9 CHIEF JUDGE WILSON: But that's - - - but that's
10 - - - why isn't that this case?

11 MR. KELLER: It's not this case, Your Honor,
12 because he's not challenging the state's very power to
13 prosecute his criminal conduct, which here, to be clear - -
14 -

15 JUDGE HALLIGAN: He is, though.

16 MR. KELLER: - - - was the unlicensed possession
17 of a firearm.

18 JUDGE HALLIGAN: I think that what he's arguing,
19 and I'm sure, perhaps, you know, he'll correct me if I'm
20 wrong. Is that because - - - and you - - - you, I
21 understand, disagree on the merits, but I think he's saying
22 in light of Bruen's invalidation of the proper cause
23 requirement, a statute which has as its affirmative defense
24 possession of a license subject to that regime is
25 unconstitutional, at least as it applies to gun possession.

1 MR. KELLER: Your Honor, that may very well be
2 his claim, but that is not a challenge to the state's very
3 power to prosecute him for his conduct.

4 JUDGE HALLIGAN: How - - -

5 MR. KELLER: What it's a challenge to is a
6 feature of the state's permissible regulation of his
7 conduct. And the two things are different. And I'll point
8 out - - -

9 CHIEF JUDGE WILSON: But I can change my
10 hypothetical to require you to get a license for voting,
11 and to be - - - get the license for voting, you have to be
12 white. I can make this on all fours.

13 MR. KELLER: And again, Your Honor, but we think
14 that distinction is crucial here. If this case - - - if
15 this court is presented in the future with the case where
16 there is a statute which the state absolutely has no power
17 to prosecute - - -

18 JUDGE HALLIGAN: And is that because it's - - -

19 MR. KELLER: - - - that might be the place to
20 draw the line. But this is not that case. I'm sorry,
21 Judge?

22 JUDGE HALLIGAN: - - - is that because it's an
23 affirmative defense, or is that because you think it's not
24 a good argument on the merits?

25 MR. KELLER: It's - - - it's - - - we're not

1 peeking at the merits. That might be one way the court
2 could determine it - - -

3 JUDGE HALLIGAN: Okay. So - - - so - - -

4 MR. KELLER: - - - but I don't think this way - -
5 -

6 JUDGE HALLIGAN: - - - what - - - what is - - -

7 MR. KELLER: - - - requires the court to do it.
8 I think it's - - - it is undisputed in this case that the
9 state had the power to punish - - - to prosecute and punish
10 Mr. Johnson for possessing an unlicensed firearm.

11 JUDGE HALLIGAN: If - - -

12 CHIEF JUDGE WILSON: Well, why do you say that?

13 MR. KELLER: He - - - he's just complaining about
14 a feature of that regulation. A single feature which,
15 frankly, wasn't even in effect at the time of his arrest.

16 JUDGE HALLIGAN: If the statute instead included
17 some requirement that you prove - - - that the state proved
18 that the defendant lacked a license. So it was not an
19 affirmative defense, but it was an element. Would that
20 change your view?

21 MR. KELLER: No, Your Honor. Because the state
22 would still have the power to punish him, even though it
23 perhaps had gone about that in a constitutionally
24 problematic way - - -

25 CHIEF JUDGE WILSON: Why do you - - -

1 JUDGE HALLIGAN: I'm not sure I understand - - -

2 MR. KELLER: - - - it still had the - - -

3 JUDGE HALLIGAN: I'm not sure I understand - - -

4 MR. KELLER: - - - power to punish him.

5 JUDGE HALLIGAN: I'm not sure I understand that -
6 - - that point.

7 MR. KELLER: Okay. Maybe - - - I'm sorry.

8 JUDGE HALLIGAN: I mean - - -

9 MR. KELLER: I apologize. Let me try again to
10 get it out. He cites in his brief, cases like Loving v.
11 Virginia and Lawrence v. Texas, which clearly dealt with
12 the state punishing conduct. It under no way had the - - -
13 had the ability to punish.

14 CHIEF JUDGE WILSON: It - - - in no way, because
15 the conduct sought to be punished was unconstitutional?

16 MR. KELLER: There was a substantive due process
17 right to engage in that conduct, which is not - - -

18 JUDGE HALLIGAN: Because the conduct was
19 constitutionally protected. And I believe that they are
20 arguing that the conduct here is likewise constitutionally
21 protected, and that absent some permissible restriction on
22 that which they say the regime did not put in place, that
23 it's no different.

24 So that's why I'm just - - - I'm trying to
25 understand - - -

1 MR. KELLER: Respectfully, Your Honor - - -

2 JUDGE HALLIGAN: - - - the basis for the
3 distinction.

4 MR. KELLER: Respectfully, Your Honor, that's not
5 his claim here. He says it in his brief himself several
6 times, we are not questioning the state's power to punish
7 the unlicensed possession of a weapon. He's not raising
8 that claim here.

9 CHIEF JUDGE WILSON: Well, but - - -

10 MR. KELLER: But if he was, it might be a
11 different case.

12 JUDGE CANNATARO: But a license - - - but
13 Counsel, if the licensed possession of a weapon was the
14 subject of this bill that we've crafted here that says no
15 one except a law enforcement officer can have - - - can
16 carry a weapon, how does that - - - how - - - can you
17 seriously argue that that doesn't affect the state's right
18 to prosecute unlicensed possession of a weapon?

19 MR. KELLER: If the - - - if you're saying a very
20 simple licensing regime where it said in order to obtain a
21 license, you have to be a law enforcement officer?

22 JUDGE CANNATARO: I mean, the same system we have
23 here. Assume that we have the same Penal Law provision
24 that criminalizes unlicensed possession of a weapon, and we
25 also have a licensing statute. But the licensing statute

1 says no one but a law officer can license a weapon in the
2 State of New York?

3 MR. KELLER: In the case of just a single
4 licensing provision, I think it might be a harder question
5 to answer. But here we have a multifaceted - - -

6 JUDGE CANNATARO: You said they all - - -

7 MR. KELLER: - - - licensing regime - - -

8 JUDGE CANNATARO: - - - they all rise and fall -
9 - -

10 MR. KELLER: - - - most of which the Supreme
11 Court has said is totally proper.

12 JUDGE CANNATARO: So that would not be a waivable
13 argument?

14 MR. KELLER: In the case of a single provision
15 licensing scheme, there - - - it might be hard to draw the
16 distinction between the licensing provision itself and the
17 state's power to prosecute.

18 CHIEF JUDGE WILSON: Well, suppose - - -

19 MR. KELLER: But I don't think that's the case
20 here at all.

21 CHIEF JUDGE WILSON: - - - suppose you had the
22 same licensing scheme here, but also it defined proper
23 cause as being employed as a law enforcement officer?

24 MR. KELLER: Yes, Your Honor.

25 CHIEF JUDGE WILSON: We have multifactors on him.



1 MR. KELLER: And if I understand Your Honor's
2 question correctly, there were no other bases - - -

3 CHIEF JUDGE WILSON: No, no.

4 MR. KELLER: - - - for the denial of the license.

5 CHIEF JUDGE WILSON: No. There - - - the
6 existing provisions would also be there. So good moral
7 character, no prior felony, all those other things are
8 still there. All I've done is change the statute to find
9 proper cause as being employed by a law enforcement agency.

10 MR. KELLER: If the defendant had applied for a
11 license. If that provision had been the basis for the
12 denial of a license. Meaning he had properly - - - you
13 know, invoked standing to raise it, and - - -

14 CHIEF JUDGE WILSON: I'm just focusing on - - -

15 MR. KELLER: - - - then he could raise it.

16 CHIEF JUDGE WILSON: - - - waivability for a
17 moment. Not standing.

18 MR. KELLER: Again, I think he - - - I think even
19 in that case, Your Honor, because it didn't go, ultimately,
20 the state, if it had a proper licensing provision, could
21 punish the - - - the conduct. I think he should be able to
22 waive it. Now, again - - - and if I could briefly address
23 the - - - the broader throughline, as Judge Cannataro put
24 it.

25 It cannot be - - - the test cannot only be the

1 public interest. Defendant relies on the broadest language
2 from Seaberg in this court's decisions that claims
3 implicating the public interest or those that transcend the
4 defendant's own interests may not be waived. But he
5 ignores both the clarifying language of this court's
6 decisions and their holdings.

7 The public interest cannot be the test. All - -
8 -

9 JUDGE HALLIGAN: Can I just ask you - - -

10 MR. KELLER: - - - constitutional schemes affect
11 the public interest on some level.

12 JUDGE HALLIGAN: I know your light is on. If I
13 could ask you one question about the merits?

14 MR. KELLER: Yes, Your Honor.

15 JUDGE HALLIGAN: I was struck - - - I looked at
16 Antonyuk, and it looks to me like there the state briefed
17 the question of the application of the history and
18 tradition test. Yes?

19 MR. KELLER: Yes, Your Honor.

20 JUDGE HALLIGAN: And not here. So I understand
21 that you argue that the waiver is valid and that there's no
22 standing. But if we were to reach the merits, why do you
23 think that that test is not in play here, as indicated by
24 the absence of a brief that addresses that test?

25 MR. KELLER: I don't think - - - and on this very

1 subject, I think a useful guide for this court might be the
2 Frye test. Where, once a court determines certain evidence
3 to be admissible - - - you know, generally accepted under -
4 - - under scientific principles - - -

5 JUDGE HALLIGAN: If we think there is merit - - -

6 MR. KELLER: - - - it doesn't have to be
7 repeated. They don't have to reinvent the wheel during
8 every case. The Supreme Court has said a lot of these
9 provisions - - -

10 JUDGE HALLIGAN: So just - - - just so I'm clear.

11 MR. KELLER: Yes, Your Honor.

12 JUDGE HALLIGAN: If we think that the merits are
13 in play here, and I understand you argue there are multiple
14 reasons why they're not but are you suggesting then that we
15 would go look at your briefs in another case? Are you
16 suggesting that the - - - that the - - - I'm just trying to
17 see where you are on this question.

18 MR. KELLER: Well, Your Honor, I guess it depends
19 which provisions you're seeking to uphold. You know, I
20 think it's already been conceded they only drew in - - -

21 JUDGE HALLIGAN: We wouldn't be seeking to uphold
22 anything, I think.

23 MR. KELLER: I'm sorry, Your Honor. I guess it
24 depends which licensing provisions you were - - - you were
25 seeking to determine the constitutionality of.

1 Here, I think the court need look no further than
2 Bruen itself, its decision in *Cabrera*, where even though it
3 didn't reach the merits, it said Bruen did not reach
4 anything but the proper course standard. And perhaps the
5 Supreme Court's decision in *Rahimi*.

6 JUDGE HALLIGAN: But I don't think Bruen
7 addresses - - - but if you have a different view, tell me.
8 I don't think Bruen addresses the question of the
9 consequence of invalidating the proper cause requirement.
10 Right? So is that a function of severability? Is that a
11 function of application of the history and tradition test?
12 How would one resolve, if it was properly presented, that
13 question?

14 MR. KELLER: So in *Rahimi*, which is the Supreme
15 Court's - - -

16 JUDGE HALLIGAN: Yeah.

17 MR. KELLER: - - - latest decision on the Second
18 Amendment, it said when legislation and the Constitution
19 brush up against each other, a court's task is to seek
20 harmony, not to manufacture conflict. This court has
21 already harmonized Bruen with New York's licensing regime
22 in *Cabrera* when it said, even though it wasn't a holding -
23 - - it's any - - -

24 JUDGE HALLIGAN: I don't think *Cabrera* reaches
25 any conclusion on the question of what flows from the

1 invalidation of the proper cause requirement.

2 MR. KELLER: It said - - - in Cabrera the court
3 said Bruen did not address any other aspect of New York's
4 licensing scheme other than the proper cause provision - -
5 -

6 JUDGE HALLIGAN: Which leaves the question open,
7 it seems to me, yes?

8 MR. KELLER: So the question - - - well, Bruen
9 didn't address it, and I don't think the court needs to go
10 any further than Bruen did. I think the court should hold
11 as consistent with all of the Appellate Division
12 departments to reach the issue - - -

13 JUDGE RIVERA: But - - - but Bruen - - -

14 MR. KELLER: - - - that everything else survives.

15 JUDGE RIVERA: - - - but Bruen - - -

16 MR. KELLER: Yes, Your Honor.

17 JUDGE RIVERA: Bruen sets out the test to
18 determine how - - - whether or not a provision is
19 constitutional.

20 MR. KELLER: It does, Your Honor.

21 JUDGE RIVERA: And is - - - is not in part - - -
22 whether you think it's waived, or you think he has
23 standing, put all that aside. It is not, in part, his
24 argument that if you're looking at that test, the state
25 didn't carry its burden to show that it was indeed

1 constitutional?

2 MR. KELLER: I think if he's challenging
3 something that the Supreme Court in Bruen didn't
4 specifically say was okay - - -

5 JUDGE RIVERA: No. But it set out the test of
6 how one determines it. The only issue in the case was the
7 proper cause requirement to address that requirement.

8 MR. KELLER: And it - - - in this case, the
9 proper cause requirement was no longer in play. And so
10 anything that he challenged, if he had challenged other
11 provisions of New York's licensing law, the State may have
12 been able to come forward and give the historical tradition
13 evidence. But he didn't. And so then we're back to
14 Cabrera, and it's unreserved.

15 CHIEF JUDGE WILSON: Thank you.

16 MR. KELLER: Thank you.

17 MR. RUTKIN-BECKER: This is a case, of course,
18 that is about constitutionally protected conduct. Mr.
19 Johnson alleged below that he was engaging in his Second
20 Amendment right, which New York State simply did not
21 recognize at the time.

22 And there really was no dispute here that he
23 possessed this firearm for self-defense. He was an Uber
24 Eats delivery driver who carried in his - - - gun in his
25 moped for self-protection. He was not alleged to have

1 used, threaten, or even removed the gun from his moped in
2 any way.

3 And Bruen - - -

4 JUDGE HALLIGAN: Could I - - - could I ask you?
5 I just want to make sure I make good use of your time.

6 MR. RUTKIN-BECKER: Yes.

7 JUDGE HALLIGAN: You say in your reply brief
8 that, at a minimum, the court should remit to the trial
9 court for a hearing. What would that consist of? What
10 would the questions be that would be presented, in your
11 view?

12 MR. RUTKIN-BECKER: The question presented would
13 be the constitutionality of the licensing scheme that
14 existed at the time Mr. Johnson was arrested, and - - -

15 JUDGE HALLIGAN: What exactly does that mean,
16 "the constitutionality"? You did not challenge in the
17 first instance any specific provisions other than noting
18 that the proper cause requirement had been invalidated? I
19 realize in your Appellate Division brief and here, you
20 identify some other specific ones. But would that mean
21 that you would - - - you would think that you could
22 identify a range of provisions and go through the history
23 and tradition analysis?

24 Would the question instead be whether or not the
25 invalidation of proper cause prohibits any conviction under

1 the Penal Law? That's a different question of law, I
2 think. What would be before the court?

3 MR. RUTKIN-BECKER: Right. So the invalidation
4 of proper cause did carry with it the significant
5 consequence that an individual could not be prosecuted
6 merely because they didn't have a license under that
7 regime.

8 JUDGE HALLIGAN: In your view?

9 MR. RUTKIN-BECKER: In our view, and that flows
10 directly from Shuttlesworth. And I think it's really
11 important to note that - - -

12 CHIEF JUDGE WILSON: But if that is right, what
13 is it you'd be asking the trial court to do? What's the
14 hearing?

15 MR. RUTKIN-BECKER: So to the extent that this
16 court finds that proper cause was severable or not in
17 effect at the time, a hearing would address the
18 constitutionality of the remainder of the licensing scheme
19 under the proper rubric. Because here the court did not do
20 that. The court found that - - -

21 JUDGE HALLIGAN: But why would you be allowed to
22 raise additional challenges to specific provisions that you
23 didn't raise in the first instance in the motion to
24 dismiss?

25 MR. RUTKIN-BECKER: Because we have an explicit

1 finding here by the trial court that every other provision
2 in New York's licensing was - - -

3 JUDGE HALLIGAN: Well, whether we read the trial
4 decision that way or perhaps read it differently, is that
5 what that would hinge on for you? We'd have to read the
6 trial decision as some broad holding?

7 MR. RUTKIN-BECKER: Well, it was, Your Honor.
8 And I think there was - - - there's a major issue with New
9 York's licensing scheme, both with proper cause and with
10 good moral character. Where at the heart of New York's
11 licensing prior to the effective date of the new
12 legislation, is really subjecting a constitutional right to
13 the unfettered discretion of a government official. That's
14 exactly what Shuttlesworth and Staub - - -

15 JUDGE CANNATARO: But that's not what I thought
16 your answer was to the question of what is it that you're -
17 - - that you could raise when you get back on this remand
18 to the trial court?

19 You're - - - you answered with a much more
20 general - - - the validity of the entire licensing regime,
21 which I assumed meant that you read Bruen as invalidating
22 the entirety of the licensing regime.

23 MR. RUTKIN-BECKER: So Bruen did invalidate the
24 public carry license - - -

25 JUDGE CANNATARO: No question.

1 MR. RUTKIN-BECKER: - - - regime.

2 JUDGE CANNATARO: What about the rest of it?
3 Because that's what we're struggling with.

4 MR. RUTKIN-BECKER: Right. So for someone - - -

5 JUDGE HALLIGAN: Or it invalidated the proper
6 cause requirement.

7 JUDGE CANNATARO: Proper cause. Yes.

8 MR. RUTKIN-BECKER: It invalidated proper cause
9 in - - - in every case. But I think what Shuttlesworth and
10 Staub and those cases stand for is that someone cannot - -
11 - it's a standing and a merits holding that flows from
12 those cases that somebody cannot be prosecuted merely
13 because they didn't submit to - - -

14 JUDGE HALLIGAN: But that, to me, it seems, is
15 about the question, what are the consequences of Bruen's
16 invalidation of the proper cause requirement for a
17 conviction? That's a different question, I think, than
18 let's go through all the other aspects of the regime as it
19 stood on that date, and examine whether those pass history
20 and tradition. But maybe I'm misunderstanding.

21 MR. RUTKIN-BECKER: So I do think that's right.
22 And Bruen itself notes that party presentation in a given
23 case might dictate a certain result. Here, the way I read
24 the prosecution's response to Mr. Johnson was to really be
25 arguing that just because Mr. Johnson did not submit even

1 to a background check, for example, that he could lawfully
2 be prosecuted for exercising his Second Amendment rights.

3 And that's really what Shuttlesworth - - - I
4 mean, that - - - that's exactly what happened in
5 Shuttlesworth. There was a requirement that was really
6 akin to a background check requirement in that case where
7 somebody had to submit a written application, they had to
8 denote how many people would be involved in the protest.
9 And the Supreme Court noted that licensing generally could
10 be valid, that the government has a public safety interest
11 in regulated public streets in Shuttlesworth as well. And
12 nobody was - - - it was not relevant in that case, that
13 Rev. Shuttlesworth had failed to submit to a background
14 check.

15 JUDGE GARCIA: And so I see your red light is on.
16 And with the Chief Judge's permission, I'd just like to go
17 back to something just so I'm clear. And forgive me if
18 you've answered this. But has this court ever held that an
19 issue is - - - well, issue both needs to be preserved and
20 is nonwaivable?

21 MR. RUTKIN-BECKER: Yes, Your Honor. Voluntary -
22 - - voluntariness, competency as well.

23 JUDGE GARCIA: So we've held that voluntariness
24 needs to be preserved, but at the same time is nonwaivable?

25 MR. RUTKIN-BECKER: Correct, Your Honor.

1 JUDGE GARCIA: So if I don't preserve at my
2 nonvoluntary plea that it's nonvoluntary, then I can't
3 appeal it?

4 MR. RUTKIN-BECKER: There are exceptions to the
5 preservation requirement that might get at that issue, but
6 as a general matter, yes, it is a claim that needs to be
7 preserved. And this court has made clear that there - - -

8 JUDGE GARCIA: So a nonvoluntary plea claim has
9 to be preserved at that time?

10 MR. RUTKIN-BECKER: If there's a practicable
11 opportunity to do so, yes, it does.

12 JUDGE GARCIA: During a nonvoluntary plea?

13 MR. RUTKIN-BECKER: That's this court's
14 articulation of the preservation rule in those cases.

15 JUDGE GARCIA: Other than in nonvoluntary plea
16 preservation, have we ever done that?

17 MR. RUTKIN-BECKER: A request for competency, I
18 believe, would also need to be preserved. And the reason
19 why it's because there needs to be - - -

20 JUDGE GARCIA: So if the request for - - - just
21 so I'm clear, and I'm asking. A request for competency, if
22 it's not made, a later claim that you've waived that is not
23 going - - - that you've waived, it's not going to be heard
24 then, you would - - - you can waive it? Even though - - -

25 MR. RUTKIN-BECKER: I believe you cannot waive

1 those claims, but you would - - -

2 MR. RUTKIN-BECKER: Even if you've never
3 preserved it? I never asked for a competency hearing.

4 MR. RUTKIN-BECKER: Right. So there does have to
5 be a sufficient record for review, which is why
6 preservation is important in that context. That's why
7 preservation is so important in the constitutional context,
8 as this court made clear in Cabrera. But nothing in
9 Cabrera or David or any of this court's prior decisions,
10 Baumann & Sons as well, requiring preservation of
11 constitutional challenges, really speaks to a lack of
12 significance or a lack of public interest in the right.
13 There's simply different interests at play in both
14 contexts, as I - - - I think - - -

15 JUDGE GARCIA: But I just - - - my question is
16 going to some of the questioning before, which is just
17 hypotheticals, such an outrageous violation but we would
18 still require preservation of it? So that would be kind of
19 the analogy here. Like, it's so bad, this is so
20 outrageous, this facial challenge, but we still require you
21 to preserve it. That seems to strike me as inconsistent
22 with a nonwaivability approach.

23 MR. RUTKIN-BECKER: I - - - to be frank, Your
24 Honor, I think that that's more consistent with perhaps a
25 critique of this court's preservation rule in the

1 constitutional challenge context, but I - - -

2 JUDGE GARCIA: So are you asking us then to
3 revisit our requirement that this be preserved?

4 MR. RUTKIN-BECKER: No, I'm not. Precisely
5 because, as this court has explained in Cabrera, there's a
6 rationale for that rule that, frankly, is in opposite to
7 the - - - the waivability context. The rationale - - -

8 JUDGE HALLIGAN: But Seaberg identifies a
9 rationale for the rule on appeal waivers?

10 MR. RUTKIN-BECKER: Yes. It absolutely - - -

11 JUDGE HALLIGAN: That's actually along similar
12 lines, I think.

13 MR. RUTKIN-BECKER: It's the - - - the most
14 broadly speaking, the rationale in Seaberg, and this is
15 Seaberg at 7, is the integrity of the criminal justice
16 system as a whole. And I submit that the state's arguments
17 here that, really, this is just focused on the process used
18 to churn out guilty pleas, and as long as that appears fair
19 as a - - -

20 JUDGE RIVERA: Can you address that point that -
21 - - that you're focusing too narrowly on the language in
22 Seaberg that you cherrypicked this particular language, but
23 there's clarification in the case law and in Seaberg that
24 shows that the public interest is much more narrow than - -
25 - than what you argue?

1 MR. RUTKIN-BECKER: So the public interest
2 language that - - -

3 JUDGE RIVERA: Yeah.

4 MR. RUTKIN-BECKER: - - - I've cited to about
5 transcending the individual interests in appellate review
6 that comes from Muniz. That's been cited recently. I
7 mean, the last waivability challenges that this court heard
8 in Brown, the Attorney General cites to, the court found
9 that that claim was waivable precisely because it's a very
10 - - - and that was a claim about the right to speak at
11 sentencing. The majority found that that was waivable
12 precisely because it's such an individualized claim.

13 Recently in the Silva Santos case, in Judge
14 Wilson's dissent, there was a discussion of waivability
15 with public interest as the standard. So - - - and I
16 don't think the disagreement in that case was about the
17 waivability standard. It was about perhaps the
18 applicability of that.

19 So that's the standard that's been most recently
20 used. But I think I'll point to a constitutional speedy
21 trial as an example of a claim that really demonstrates
22 that this claim ought to be nonwaivable at all. I think,
23 as Your Honors noted, if there's a - - - the concern that
24 even the mere risk of an individual who's factually
25 innocent, based on the time that's elapsed, might be forced

1 to plead guilty, is enough to demonstrate that an issue
2 should be nonwaivable. Then, here, we have a claim that
3 someone, in fact, should not be prosecuted in the first
4 instance, is perhaps languishing in prison for a
5 constitutionally protected conduct, in that situation the
6 Supreme Court has said - - - Welch v. United States, right,
7 which we cite in our briefing. That finality interests are
8 at their weakest, and it's a fundamentally unfair decision
9 to thrust on any individual defendant whether to even
10 consider having to take on more time to vindicate what's a
11 collective interest.

12 CHIEF JUDGE WILSON: Thank you.

13 MR. RUTKIN-BECKER: Thank you.

14 (Court is adjourned)

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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Johnson (Omar) v. People, No. 86 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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