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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 62

SEBASTIAN TELFAIR,

Appellant.

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20 Eagle Street  
Albany, New York  
September 13, 2023

Before:

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

Appearances:

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1 CHIEF JUDGE WILSON: Next case is Number 62,  
2 People v. Sebastian Telfair.

3 MR. KRINSKY: Good afternoon, Your Honors. My  
4 name is Barry Krinsky. I'm representing Mr. Telfair. Your  
5 Honor, I would request three minutes of rebuttal.

6 CHIEF JUDGE WILSON: Yes, sir.

7 MR. KRINSKY: I will discuss the Bruen issues in  
8 some detail. But I would first like to address several  
9 other issues that we originally raised on our original  
10 appeal.

11 Several salient facts that are relevant in - - -  
12 on both issues I would like to point to the court's  
13 attention. This offender was arrested back in 2017. The  
14 case was tried in 2019. I was not the original trial  
15 lawyer on the case, but I did take over the trial of this  
16 case along with co-counsel, and also did represent the  
17 defendant to the Appellate Division, as well as making an  
18 application for a stay of the execution of judgment in this  
19 case, as well as bail to the Appellate Division before  
20 Judge Leventhal, who granted the stay and granted bail.  
21 The defendant posted the bail and is currently at liberty,  
22 has been at liberty since September of 2019.

23 The application for the stay was continued by  
24 Judge Barros, who wrote a dissent in the Appellate Division  
25 and also granted leave to this honorable court. And I made

1 a further application to this honorable court for the stay  
2 to be continued which was in fact granted.

3 The salient facts that are relevant in this case  
4 are at least the following. The defendant had been a  
5 longtime resident of Florida for more than a decade. He  
6 was an NBA basketball player, and he originally grew up in  
7 Coney Island, Brooklyn. He then became an NBA news - - -  
8 player. He was married - - -

9 JUDGE SINGAS: Mr. Krinsky, can I - - - can I  
10 just get to the iss - - - one of the issues that I - - -  
11 I'd like to discuss? Because I think we're up against the  
12 clock here.

13 MR. KRINSKY: Okay. Sure.

14 JUDGE SINGAS: But your Molineux argument is a  
15 propensity argument, a classic propensity argument.

16 MR. KRINSKY: Right.

17 JUDGE SINGAS: But the way I see it - - - and I  
18 - - - I'd like your opinion on this - - -

19 MR. KRINSKY: Sure.

20 JUDGE SINGAS: - - - is the verdict sort of  
21 suggests that the jury didn't rely on a propensity argument  
22 because they acquitted him of three of the guns. And I  
23 would think that if they were merely deciding this case on  
24 propensity reasons, they wouldn't have undergone the  
25 analysis, which they seemingly did, to come to the verdict

1 that they did. Am I incorrect about that?

2 MR. KRINSKY: I - - - with all due respect, I  
3 think you're not, for the following - - - for the following  
4 reason. The defendant was charged in the initial  
5 indictment with six counts relating to four weapons that  
6 were in the car during the course of the - - - the car was  
7 transported from Florida to New York. Mr. Telfair did not  
8 pack the car. He was not in the car when it was  
9 transported from Florida to New York. Eventually he gets  
10 stopped for a traffic infraction, and they search the car.  
11 There's all sorts of personal property inside - - - inside  
12 the car.

13 To get to your specific question that you're - -  
14 - that you're asking, at the trial, the jury was out  
15 several days deliberating. The jury acquitted the  
16 defendant of five of the six counts relating to three of  
17 the four guns. Those guns were found in - - - in the trunk  
18 area of the vehicle. Inside the console of the car was one  
19 gun. The - - - the court, over our vehement objection,  
20 allowed into evidence a substantial, in our violation - - -  
21 in our position, violation of Molineux.

22 What Your Honor is getting at is the question of,  
23 well, they must've made an analysis to separate it all out.  
24 I submit to Your Honor that that's not accurate. Because  
25 what happened in this case, after the jury being out for

1 several days of deliberations, they sent back a note to the  
2 judge, basically - - - and it's in the record exactly what  
3 the note was. And the note essentially said, how exactly  
4 are we supposed to use this Molineux evidence as it relates  
5 to what we're supposed to consider on in knowledge or lack  
6 of knowledge or mistake, or lack of knowledge on the case?  
7 And within - - - over our objection - - - I then made an  
8 objection - - - I believe I moved for a mistrial - - - I  
9 indicated to the judge that he should never have brought  
10 this into evidence in the first place and that the charge  
11 that he gave to the jury was so confusing and so erroneous,  
12 and Judge Barros pointed out in her dissent that the jury  
13 was completely confused. What in the world does two  
14 incidents from 2006 and 2007 have to possibly do with  
15 finding a gun in the console of the car? Within ten  
16 minutes, the jury acquitted the defendant of five of the  
17 six counts and convicted him of - - - of that - - - of that  
18 one count that - - - that Your Honor - - - that Your Honor  
19 is referring to.

20 I think it important to know what the - - - the -  
21 - - the prior Molineux stuff was as to why would you even  
22 allow it in. One was - - -

23 JUDGE GARCIA: Counsel, to that point - - -

24 MR. KRINSKY: - - - a 2006 - - -

25 JUDGE GARCIA: - - - I'm sorry, Counsel.



1 MR. KRINSKY: I'm sorry, sure.

2 JUDGE GARCIA: To - - - that point on the prior  
3 Molineux, it seems to me Molineux's two parts - - -

4 MR. KRINSKY: Would you speak a little louder?  
5 I'm sorry.

6 JUDGE GARCIA: I'm sorry. Molineux is two  
7 points. Two prongs, in essence, or two steps. One is,  
8 does it fall within the exceptions to the propensity  
9 evidence, right? The categories under Molineux. Issue of  
10 law. Point two, even if it does, was it an abuse of  
11 discretion to let it in?

12 So taking step one, are you arguing that this  
13 evidence didn't fall within any of the Molineux exceptions,  
14 or are you arguing it was an abuse of discretion to let it  
15 in? Or - - -

16 MR. KRINSKY: Bo - - - bo - - - both. Both.

17 JUDGE GARCIA: Okay. So which - - - why wouldn't  
18 this fit into lack of mistake or accident?

19 MR. KRINSKY: Be - - - be - - - because the  
20 defendant's defense was not lack of mistake. Defendant's  
21 defense was that he had no - - -

22 JUDGE GARCIA: That it was an accident.

23 MR. KRINSKY: No. Th - - - that he had no know -  
24 - - he didn't pack the trunk, and that he had no knowledge  
25 that the guns were in the car. That was the - - -

1 JUDGE HALLIGAN: So what's the distinction - - -

2 MR. KRINSKY: The dis - - -

3 JUDGE HALLIGAN: - - - between lack of mistake  
4 and knowledge - - -

5 MR. KRINSKY: Okay, I'll give you an example - -  
6 -

7 JUDGE HALLIGAN: - - - would you say?

8 MR. KRINSKY: - - - of the distinction.

9 Distinction was in 2006, the prior Molineux incident that  
10 the judge allowed in over our objection, defendant was on -  
11 - - was on an airplane, traveling to - - - to go to Boston  
12 to play a basketball game with the Boston Celtics. He  
13 stopped at the airport. And on the plane, in a - - - in a  
14 - - - in a pillow - - - in a pillowcase, they find a  
15 cosmetic bag of his wife's with a gun inside that bag.  
16 They conduct a law enforcement investigation at that time.  
17 Police come in, and they check it out. And he explains to  
18 them what happened. Says, I made a mistake. I grabbed my  
19 wife's bag. And inside the bag was all my wife's  
20 cosmetics. I didn't know it. I didn't know the gun was in  
21 there. It's her gun - - -

22 JUDGE RIVERA: But that - - - isn't that the  
23 point, that - - - the mistake is, I took the wrong bag, and  
24 I didn't know that there was a gun in it. You're still  
25 back to, I didn't know.

1 MR. KRINSKY: Well, the difference is - - - the  
2 difference is is that he - - - that he - - - he - - - the  
3 mistake was there, that he says, I took my wife's bag. I  
4 didn't know the gun was in there. That's not the same  
5 thing as - - - and - - - and that - - - he was never  
6 charged in that case. It was a prior honest mistake, a  
7 prior innocent mistake, not a prior bad act, that we allow  
8 in on some cumulative Molineux theory.

9 JUDGE HALLIGAN: Sorry to interrupt you, Counsel.

10 MR. KRINSKY: It's okay.

11 JUDGE HALLIGAN: Isn't that what you're arguing  
12 here, that - - - that - - - isn't that what the defendant  
13 argued at trial, that it was something that he didn't know  
14 about, that the guns were in the truck, just as he argued  
15 previously that he didn't know the bag wasn't his, and  
16 therefore, didn't know the gun was in the bag?

17 MR. KRINSKY: Well, here's a - - - here - - -  
18 here's a - - - here's a difference. This was one of the  
19 arguments that we made prior to trial with the - - - with  
20 the judge. The - - - the defendant did not testify at the  
21 trial. The defendant did not make any statements to the  
22 police after he was arrested. So there's no testimony from  
23 the defendant. There's no admission from the defendant as  
24 to anything - - -

25 JUDGE GARCIA: Is your - - - is your rule would



1 be that it's only when the defendant testifies that you can  
2 put in Molineux evidence?

3 MR. KRINSKY: No, I didn't say that. I said that  
4 - - - that - - - the part of the discussion as to whether  
5 or not you should allow any of this in, because it's so  
6 prejudicial and so - - - and the probative value is so de  
7 minimis from incidents that happened thirteen and fourteen  
8 years ago - - -

9 JUDGE GARCIA: That's a balancing issue.

10 MR. KRINSKY: Yes.

11 JUDGE GARCIA: I think we were start - - - and  
12 that's a part two.

13 MR. KRINSKY: Right.

14 JUDGE GARCIA: I think we were starting with,  
15 does it fall within any of the exceptions was the focus, I  
16 think, of this questioning. And I think it was why is it  
17 an accident or mistake that I took the bag; I didn't know  
18 it was a gun. I took the car; I didn't know there was a  
19 gun in the back. I took the bag; I didn't know it was my  
20 wife's bag; it had a gun in it. Why - - -

21 MR. KRINSKY: Well, that - - - that - - - because  
22 the - - - the - - - the defendant didn't testify, and - - -  
23 and he didn't call any witnesses. The argument was made by  
24 counsel that the People failed to prove beyond a reasonable  
25 doubt that the defendant knowingly and unlawfully possessed

1 a weapon that was found in the - - -

2 JUDGE GARCIA: But you developed a theory that  
3 this was in the back of the car, or it was in the car, and  
4 he took the car from Florida, and he had a certain amount  
5 of time with that car in New York. Wasn't that all part of  
6 the defense theory of this case?

7 MR. KRINSKY: Well, I - - - I would submit - - -  
8 I understand Your Honor's point. I think that the - - -  
9 the argument that was made at the time was that none of  
10 this should've been allowed in because the prejudicial  
11 effect of it outweighed the probative value. The - - - the  
12 prosecution's theory was that somehow this comes in because  
13 of Your Honor's point, that somehow this dealt with the  
14 question of whether or not it was accident or mistake.

15 JUDGE CANNATARO: But Counsel, that's what we're  
16 exploring. And I - - - I desperately want to understand  
17 this correctly. Because what I'm seeing is, in the first  
18 instance, he claimed a mistake. I took the wrong bag; I  
19 didn't know there was a gun in the bag.

20 MR. KRINSKY: That was thirteen years before.

21 JUDGE CANNATARO: Okay. Twenty-five minutes - -  
22 - I'm just talking about the nature of the claim. And  
23 that, you concede, is a mistake. Here, he's - - - he's now  
24 in a vehicle in which guns are present. And he's claiming,  
25 from where I stand, essentially the same thing. I didn't

1 know that there were guns in the vehicle because I didn't  
2 pack the vehicle. I didn't put the guns in there. I just  
3 happened to be the guy who was in it.

4 I don't understand the distinction. So - - - and  
5 I think maybe you tried to explain it, and I just didn't  
6 get it?

7 MR. KRINSKY: The - - - I think - - - I think the  
8 distinction is here that in the first instance, he was  
9 confronted by law enforcement, and he was gi - - - and he  
10 responded that, I made a mis - - - I grabbed my wife's bag  
11 by mistake. In the case before the - - - the jury, the  
12 defense lawyer argued to - - - to the jury that the  
13 prosecution failed to prove beyond a reasonable doubt that  
14 the defendant had any knowledge that the guns were inside  
15 the car. That was the position. And he didn't testify,  
16 and he didn't make any statements to the police.

17 So on what theory is it being rebutted? It  
18 wasn't - - - there was an issue as to whether or not, well,  
19 are you allowing this in as part of the People's direct  
20 case?

21 JUDGE HALLIGAN: But doesn't that go, Counsel, to  
22 the question of whether it was put at issue as opposed to  
23 whether the nature of what happened was the same in the  
24 different instance? In other words, it was the same kind  
25 of mistake?

1 MR. KRINSKY: I think - - - with all due respect,  
2 I think it - - - I think it's both, Your Honor. And I  
3 think that whatever theory you want to use, this - - - the  
4 testimony that was allowed in from - - - from his wife,  
5 from his girlfriend, from the - - - from the police who  
6 arrested him in the second case on a misdemeanor in the car  
7 - - - all of that was so highly prejudicial that on  
8 whatever theory it was allowed in, it became so  
9 overwhelmingly prejudicial to the defendant - - - but - - -

10 JUDGE TROUTMAN: But when you - - - you go back,  
11 how - - - the difference between propensity - - - he did it  
12 before, so he must've done it this time. He lied before  
13 about whether he knew the gun was in the bag ten years ago.  
14 How does what he said or did some ten years ago prove that  
15 he did it this time?

16 MR. KRINSKY: It doesn't at all. And the whole  
17 point is it never should've been allowed in in the first  
18 place. It has no relevance whatsoever. The gun that was  
19 allegedly found in the - - - in the - - -

20 JUDGE TROUTMAN: Would it matter if it was the  
21 same gun or an item that there was a question as to what it  
22 was, like counterfeit money?

23 MR. KRINSKY: Well, it's a - - - it's a - - -  
24 there's no question that it's a different gun that was  
25 allegedly found inside of a car thirteen years earlier.

1 There's no question about that issue. So - - -

2 JUDGE TROUTMAN: If it were the same gun, would  
3 it - - -

4 MR. KRINSKY: No, it's not the same gun,  
5 obviously - - -

6 JUDGE TROUTMAN: No, no, no. You - - - you're  
7 not hearing me. If it was the same gun for this case that  
8 he had previously possessed, would it then make a  
9 difference?

10 MR. KRINSKY: That's a hypothetical situation.  
11 It may or may not make a - - - made a difference, depending  
12 upon the specific facts of both of those incidents. But as  
13 Judge Barros indicated in her dissenting opinion - - -

14 JUDGE TROUTMAN: Within the hypothetical, it's  
15 the same gun, what's - - -

16 MR. KRINSKY: It's not the same gun.

17 JUDGE TROUTMAN: In the hypothetical - - -

18 MR. KRINSKY: If it was the - - -

19 JUDGE TROUTMAN: - - - it's the same gun - - -

20 MR. KRINSKY: - - - if it was the same gun, yes.  
21 It might've made a - - - it might've made a difference in  
22 terms of - - - in terms of the argument.

23 The - - - the bottom line is - - - the general  
24 rule is that all this type of evidence is inadmissible.  
25 It's a prior uncharged crime which is highly prejudicial.

1 It's - - -

2 JUDGE SINGAS: Are you asking this court to  
3 overturn Ingram and Alv - - - Alvino?

4 MR. KRINSKY: I'm sorry?

5 JUDGE SINGAS: Are you asking us to overturn  
6 Ingram and Alvino? Because I really can't distinguish what  
7 happened in those cases with what's happening here.

8 MR. KRINSKY: I - - - well, there's a whole - - -  
9 I cited, as you know - - - I don't want to go through all  
10 the cases, we don't have the time to do that. There's  
11 many, many cases that decided - - - Singleton and countless  
12 other cases which deal with exact - - - this exact set of  
13 circumstances.

14 There was additional improper Molineux evidence  
15 that was allowed in through his wife and through his  
16 girlfriend, which were designed in an attempt, I would  
17 submit, only to mu - - - muddy up the defendant and make  
18 him seem like an unpleasant, undesirable character before  
19 the jury.

20 And all of that played into the fact that when  
21 the prosecutor, in their summation, kept harping upon these  
22 prior incidents - - - well, he did it - - - basically, the  
23 argument, cutting to the chase, having tried many case - -  
24 - cutting to the chase, what happened in the courtroom was  
25 - - - is that the prosecutor was attempting to influence



1 the jury. This is a bad guy, he ha - - - he didn't treat  
2 his wife right, he - - - his wife and he had marital  
3 issues, he basically tossed them out of the house. He then  
4 supposedly stole some of her property, gave it to his  
5 girlfriend, none of - - - all that played out over our  
6 objection. It was all uncharged crimes which should not  
7 have been allowed in.

8 The cumulative effect of all of this, especially  
9 in a case such as this, where the - - - where the jury - -  
10 - according to the defendant, the five of the six counts -  
11 - - and within ten minutes after they recha - - - get  
12 recharged on this confusing, erroneous, prejudicial Mo - -  
13 - Molineux evidence, they convict him of one count, now  
14 facing - - -

15 CHIEF JUDGE WILSON: Counsel - - -

16 MR. KRINSKY: - - - three and a half years in  
17 jail.

18 CHIEF JUDGE WILSON: - - - your time is up. If  
19 you would - - - if you have a minute or two that you want  
20 to spend on anything about Bruen that is - - -

21 MR. KRINSKY: Yes, Judge.

22 CHIEF JUDGE WILSON: - - - that is different from  
23 what we've heard before, please do.

24 MR. KRINSKY: Oh, okay. I - - - I understand  
25 that. And I understand that the - - - the court - - - so

1 just relevant facts. The defendant was a nonresident of -  
2 - - of New York at the time of - - - of this incident. Had  
3 been living in Florida for more than a decade. The guns  
4 that - - - that were subject matter of the original  
5 indictment, only one of which he was convicted of, the guns  
6 were lawfully purchased in Florida and were lawfully  
7 registered in Florida. And - - - and the - - - the  
8 defendant - - -

9 JUDGE TROUTMAN: Did he have a license in New  
10 York?

11 MR. KRINSKY: No, he did - - - he did not have -  
12 - - did not have a license in New York. Wasn't living in  
13 New York, and he would not have been able to get a license  
14 in New York as a non - - - as a nonresident at the time.  
15 The - - - the - - - the ca - - -

16 JUDGE CANNATARO: Why - - - why is that? Does  
17 New York bar nonresi - - - does New York - - -

18 MR. KRINSKY: Well - - -

19 JUDGE CANNATARO: - - - bar nonresidents from  
20 applying for - - -

21 MR. KRINSKY: Well, under the cir - - -  
22 circumstances that he would've found himself in, it  
23 would've - - - he would not have been able to get a license  
24 under those circumstances.

25 JUDGE CANNATARO: You mean he had a



1 disqualification for - - -

2 MR. KRINSKY: No, not - - - not another  
3 disqualification, just on the fact he was not in the - - -  
4 he was a nonresident at that time.

5 JUDGE CANNATARO: Well, that's my question. Are  
6 you - - - are you saying that New York law bars  
7 nonresidents from applying for a license?

8 MR. KRINSKY: Saying that under certain  
9 circumstances they're applicable, when this would've  
10 happened - - - the answer is yes, he would've been barred  
11 from getting a license. And - - - and under the - - -  
12 under - - - under Hughes decision, and then under Patterson  
13 and Baker, which I would rely upon, on the Bruen analysis -  
14 - - that he would not have been required to have applied  
15 for a license because the law was such that the law had  
16 been previously settled.

17 I'll reserve the rest of my time for rebuttal.  
18 Thank you, Judge.

19 CHIEF JUDGE WILSON: Thank you.

20 MS. JOYCE: Good afternoon. And may it please  
21 the court. Jean Joyce for the Brooklyn DA's Office.

22 JUDGE TROUTMAN: How does his possession some ten  
23 years prior to the incident in question establish that he  
24 intentionally possessed here?

25 MS. JOYCE: Right. So Your Honor, it's not the



1 possession itself. If it was just two straight possessions  
2 a few years prior, where there was no indicia of, number  
3 one, circumstances that are virtually identical to the  
4 circumstances in this case of claiming that he did not know  
5 the gun was - - -

6 JUDGE TROUTMAN: So it's propensity. He lied  
7 before; he lied this time?

8 MS. JOYCE: No, it's not propensity. It is, how  
9 does one judge the defense of, I didn't know it was in the  
10 car? That's what's been placed into issue.

11 JUDGE TROUTMAN: It's a different gun, correct?

12 MS. JOYCE: Yes. But the fact that it's a  
13 different gun is really not relevant to the question.

14 JUDGE TROUTMAN: So you were offering evidence he  
15 possessed a gun before. He knew he possessed a gun before.  
16 So - - - and he possessed one this time?

17 MS. JOYCE: What we're offering - - - what we  
18 offered was two instances where, when confronted by - - -  
19 by law enforcement with the fact that he had a loaded gun  
20 in his possession, in his dominion and control, which is  
21 what we're required to prove, he gave - - - and where that  
22 - - - those guns were secreted - - -

23 JUDGE TROUTMAN: I'm - - - I'm having trouble - -  
24 -

25 MS. JOYCE: Um-hum.

1 JUDGE TROUTMAN: - - - not - - - I'm having  
2 trouble understanding why that evidence doesn't say he did  
3 it before; he did it this time?

4 MS. JOYCE: It's - - - what we're asking the - -  
5 - what the - - - what we're asking the jury to look at is  
6 how, after the third time, is that very same excuse  
7 credible?

8 CHIEF JUDGE WILSON: Good. So let me - - - let  
9 me ask you - - -

10 MS. JOYCE: It might be credible - - -

11 CHIEF JUDGE WILSON: Let me ask you that, then.  
12 Because I - - - I think I can give you an example. We have  
13 a pretty nice carpet in our living room. We also have a  
14 really big dog. We have a gate that locks that keeps the  
15 dog out of the living room. One of my daughters repeatedly  
16 leaves the gate open. We repeatedly remind her, you're  
17 supposed to lock the gate so the dog doesn't go in there  
18 because if the dog goes in there, we then have a very large  
19 carpet-cleaning bill. She constantly forgets.

20 I don't have any reason to think that the fact  
21 that she's done this many times means that she's not  
22 genuinely forgetting. So it seems to me as if it's - - -  
23 it's propensity. It's nothing more than propensity. It  
24 doesn't indicate that she's lying about that.

25 MS. JOYCE: So there is going to be often in

1 Molineux evidence a propensity quality. But that doesn't  
2 mean that there isn't also a material aspect to the prior  
3 instances. And here, yes, you could look at it and say,  
4 well, he did it before, and he would do it again, and the  
5 jury doesn't have to question it. But we're not asking the  
6 jury to just make the conclusion based on the prior  
7 instances, oh, he's somebody who likes to possess guns.  
8 We're asking the jury to analyze this - - -

9 CHIEF JUDGE WILSON: But how - - - if - - -

10 JUDGE HALLIGAN: Aren't you really saying,  
11 though, that - - - that when he does possess guns in a  
12 circumstance that may not be lawful, that he tends to come  
13 up with a similar excuse about it, which I think is very  
14 close to what the - - - the instruction actually was?

15 MS. JOYCE: Yes.

16 JUDGE HALLIGAN: And - - - and so if the point  
17 is, you know, he makes the same excuse for unlawful conduct  
18 time and again, how is that mistake as opposed to  
19 propensity?

20 MS. JOYCE: It's not mistake. It is - - - it - -  
21 - it goes to the question of knowledge. I mean, I think -  
22 - -

23 JUDGE HALLIGAN: You're saying he knows that he  
24 has the gun and was breaking the law in each circumstance?

25 MS. JOYCE: Correct.

1                   JUDGE HALLIGAN: But in the prior two cases - - -  
2 particularly in the one on the plane, right - - - it seemed  
3 to me that law enforcement credited his position that he  
4 didn't know about it. Isn't that right? Because they  
5 didn't charge him.

6                   MS. JOYCE: They did not charge him.

7                   JUDGE HALLIGAN: Okay. Fair to say that - - -  
8 that - - - that perhaps they gave it some credit, given  
9 that they didn't charge him. So how - - - how is that  
10 specifically probative of whether he knew the guns were in  
11 the truck, if that - - - if that earlier exchange was - - -  
12 seems to me, at least, arguably credited by the police?

13                   MS. JOYCE: Well, it certainly gave him  
14 information about his - - - his sense of responsibility or  
15 you know, duty to - - -

16                   JUDGE HALLIGAN: That's what I'm struggling with.  
17 That level of generality - - -

18                   MS. JOYCE: Um-hum.

19                   JUDGE HALLIGAN: - - - seems to me to be maybe  
20 too broad for this analysis. Because it seems to me that  
21 most of the cases look very specifically - - - you know,  
22 did you file a false certificate in the past? Yes, I did.  
23 You probably know that it is false going forward. Or did I  
24 know that substance was poison the first time? Maybe you  
25 get a pass. The second time, probably not. But - - - but

1           how does that track onto what we have here?

2                   MS. JOYCE: Right. So the officer in the first  
3 case may have credited his - - - his excuse. I don't  
4 believe that we credited that excuse. I think we believed  
5 that it was just another example of him coming up with a  
6 reason for having dominion and control over - - - over an  
7 unlicensed gun, which was brought into a - - - a state that  
8 it wasn't supposed to be in, which is another factor, which  
9 is exactly like the factor in this case.

10                   But I would also point to the Cass case, where  
11 previously - - - where defendant was charged with EED - - -  
12 I'm sorry, charged with manslaughter and - - - for  
13 strangling a victim who'd made an unwanted sexual advance.  
14 And he claimed EED. And the People were then permitted to  
15 put into evidence a very similar prior instance where he -  
16 - - defendant ha - - - or where this defendant had killed  
17 somebody else and similarly claimed that he - - - he was  
18 under some sort of emotional turmoil.

19                   JUDGE CANNATARO: Ms. Joyce, can we get back to  
20 the second prong, which - - -

21                   MS. JOYCE: Um-hum.

22                   JUDGE CANNATARO: - - - of Judge Garcia's  
23 question? You - - - you've acknowledged that there's  
24 always a propensity element in - - - in these situations.  
25 But there's another part of it that is a legitimate

1 Molineux exception.

2 MS. JOYCE: Correct.

3 JUDGE CANNATARO: Did the judge abuse the - - -  
4 his discretion? Because I assume part of that process is  
5 weighing the propensity element against the admissible part  
6 of it and making a determination whether it should come in  
7 or not. Was there an abuse of discretion here by the  
8 judge?

9 MS. JOYCE: No, Your Honor. And it was - - - the  
10 - - - the test for this court is whether it was an abuse of  
11 discretion as a matter of law. The judge was very careful  
12 to give limiting instructions ten times. In addition, the  
13 People only put on the witness - - - you know, these were  
14 not mini-trials within the big trial; it was only a few  
15 witnesses.

16 And to Judge Singas' point, it - - - in any  
17 event, I think it was harmless error to the extent that any  
18 non-constitutional harmless error occurred because of the  
19 jury's verdict. The jury was able to discern the  
20 difference between his knowing possession in - - - with  
21 respect to the gun that was literally inches away from him  
22 next to his other personal items.

23 CHIEF JUDGE WILSON: Was there a - - - was there  
24 a constructive possession instruction?

25 MS. JOYCE: Yes, there was. Yes.

1           And now I'd like to turn to Bruen. I want to  
2 take a quick crack at the preservation and - - - and the  
3 standing, just very quickly, and say that, you know, what  
4 could this defendant have done? He could've applied for a  
5 license. Having failed at that, he could've made a motion  
6 in his omnibus motion and said, I believe the - - - the  
7 Second Amendment guarantees a fundamental right to possess  
8 a gun, and that this re - - - the leg - - - residency  
9 requirement and this proper cause requirement are  
10 unconstitutional.

11           I think it - - - I don't think it's correct to  
12 say that he had to make an allegation as to the standard  
13 that this court should have used. That really isn't his  
14 substantive complaint. His substantive complaint is his  
15 rights were impinged upon by these provisions of the  
16 statutory scheme.

17           JUDGE RIVERA: So let me - - - let me just be  
18 clear on this first point you're making, that he could've  
19 applied for a license. So decides he's going to leave,  
20 sending everything up, going to move to New York, or  
21 somewhere else. But he's - - - he's traveling to New York;  
22 let's put it that way. He's applying for the license  
23 before he leaves, and he, what, leaves the guns in the  
24 state where they're registered until he either gets the  
25 license or is denied the license on appe - - - like, how



1 would that work?

2 MS. JOYCE: Right.

3 JUDGE RIVERA: - - - when you're someone like  
4 this?

5 MS. JOYCE: Yeah. So people, when they move from  
6 state to state - - -

7 JUDGE RIVERA: Yes.

8 MS. JOYCE: - - - have to make accommodations for  
9 regulations and rules, driver's license regulations.

10 JUDGE RIVERA: Sure.

11 MS. JOYCE: If - - - you know, you - - - if  
12 you're going to have - - - get a driver's license in New  
13 York, you have to turn in your old one within thirty days.

14 JUDGE HALLIGAN: But see, you're - - -

15 JUDGE RIVERA: Sure. But we're talking about a  
16 Second Amendment right, so let's - - -

17 MS. JOYCE: Right.

18 JUDGE RIVERA: - - - let's go from there.

19 MS. JOYCE: So - - -

20 JUDGE RIVERA: I'm not disagreeing with you that,  
21 of course, the gentleman has to be aware of whatever  
22 regulations might apply to - - -

23 MS. JOYCE: Right.

24 JUDGE RIVERA: - - - his possession of a gun.

25 MS. JOYCE: Right. And - - - and certainly

1           there's evidence, there's some evidence in the record that  
2           he was coming up to New York prior to the date in question.  
3           He'd been back and forth for about a month. I counted at  
4           least fifteen hotel nights in the month prior. And - - -

5                    JUDGE RIVERA: Let me ask you this. What if he's  
6           driving up and he's going to Maine? Let's just say for one  
7           moment - - - just making this up - - - that Maine has a  
8           license requirement. He got a license from Maine. He's  
9           got to drive up. Is he supposed to get a license in every  
10          state along that route - - -

11                   MS. JOYCE: No. No, Your Honor. No.

12                   JUDGE RIVERA: - - - because he's driving  
13          through?

14                   MS. JOYCE: No, Your Honor. There is a federal  
15          statute which - - - which permits - - -

16                   JUDGE RIVERA: Um-hum.

17                   MS. JOYCE: - - - travelers to leave one state  
18          where they're - - - have a licensed gun and travel to a  
19          second state where they have a licensed gun, as long as  
20          they comply with certain requirements, in that the gun has  
21          to be unloaded, it has to be in a compartment of the  
22          vehicle separate from where the driver is located and if  
23          that - - - if there isn't such a compartment, then it has  
24          to be in a locked box other than the glovebox.

25                   JUDGE RIVERA: The license in the starting point,

1 the ending point - - -

2 MS. JOYCE: Right.

3 JUDGE RIVERA: - - - as long as you otherwise  
4 satisfy these federal requirements would mean he would not  
5 - - - if he had been stopped in New York - - -

6 MS. JOYCE: Right. And - - - and I - - -

7 JUDGE RIVERA: - - - he would not be subject to  
8 prosecution. It - - -

9 MS. JOYCE: Right.

10 JUDGE RIVERA: Right?

11 MS. JOYCE: I think if he - - - if he pulled out  
12 a copy of that provision and said to the state trooper,  
13 look, I'm just passing through, I've complied, my gun is  
14 unloaded - - -

15 JUDGE RIVERA: And - - - and I show my licenses.

16 MS. JOYCE: Right, and here's my license. I  
17 think - - -

18 JUDGE RIVERA: And I'm definitely going to - - -

19 MS. JOYCE: Right.

20 JUDGE RIVERA: - - - a state where I have this  
21 other license?

22 MS. JOYCE: I think he would be fine.

23 And I see my time is up. And if I could just say  
24 one thing - - -

25 CHIEF JUDGE WILSON: Yes.

1 MS. JOYCE: - - - quickly on the non-residency?

2 The court really shouldn't get to this point.  
3 However, if it concludes that preservation and standing are  
4 not bars, then the court has a - - - an obligation to  
5 construe the statute to meet constitutional requirements  
6 and - - - as opposed to overturning the entire statute.  
7 And especially with respect to the - - - the no - - - the  
8 residency issue, the statute is replete with indicia of  
9 permitting nonresidents to apply for licenses. And to the  
10 extent that there's any ambiguity, I would urge the court  
11 to read it to permit nonresidents to apply.

12 Thank you.

13 CHIEF JUDGE WILSON: Thank you.

14 MS. MURDUKHAYEVA: May it please the court.  
15 Ester Murdukhayeva for the Attorney General.

16 There are three points I'd like to make about  
17 preservation that have not yet come up. The first is that  
18 preservation is a jurisdictional requirement; it is not  
19 merely prudential. That is a limitation that is sourced  
20 not just from statute but from the New York State  
21 Constitution.

22 And the sole exception that has been judge-made  
23 is that mode of proceedings exception to preservation. And  
24 that properly reflects the jurisdictional nature of the  
25 preservation requirement.

1 JUDGE HALLIGAN: So Counsel, is it your view that  
2 there is no room for this court to find an exception for an  
3 intervening Supreme Court decision where there's a case on  
4 point from this court at all? And if so, how do you  
5 explain the discussion of that in Patterson?

6 MS. MURDUKHAYEVA: I do think that that is our  
7 argument, that there is no general futility exception to  
8 the preservation requirement. And that is because this  
9 court is always able to revisit its precedents. And it can  
10 do so even if a party is raising a claim that may  
11 ultimately not be successful in a trial court.

12 JUDGE HALLIGAN: So what do we make of the  
13 passages in Patterson that point out that there was an  
14 intervening Supreme Court decision?

15 MS. MURDUKHAYEVA: So one way to make sense of  
16 that passage would be to explain why the issue was not  
17 preserved. The majority of the Patterson decision is to  
18 explain why that error is a mode of proceedings error, why  
19 it goes to the fundamental fairness of the proceeding.

20 JUDGE HALLIGAN: Can I just ask you one other  
21 question about that? With respect to Hughes, do you view  
22 Hughes as setting forth the test for applying the Second  
23 Amendment across, you know, the range of state statutory  
24 provisions? Or did you - - - do you read that as applying  
25 only to the particular - - - you know, the prior crime

1 exception to the home business license that's at issue  
2 there?

3 MS. MURDUKHAYEVA: I think an argument could be  
4 made for either reading. But ultimately, it - - - it  
5 doesn't matter because the defendant would've had several  
6 options. One would've been to raise the argument that  
7 intermediate scrutiny is simply not appropriate, that text  
8 history and tradition is the appropriate lens to analyze -  
9 - -

10 JUDGE HALLIGAN: So - - - so they would be saying  
11 - - -

12 MS. MURDUKHAYEVA: - - - Second Amendment  
13 challenges.

14 JUDGE HALLIGAN: - - - Hughes was - - - was - - -  
15 was wrongly decided and what - - - this court should  
16 revisit it. The Supreme Court should decide otherwise.  
17 What would that look like practically?

18 MS. MURDUKHAYEVA: That - - - that's correct.  
19 Another option would be to say that some restriction fails  
20 intermediate scrutiny. And I would note the Bruen  
21 plaintiffs were in the exact same position. There was  
22 binding Second Circuit precedent that held that the proper  
23 cause requirement was constitutional - - -

24 JUDGE HALLIGAN: And so you think they - - - they  
25 could feasibly have argued that what, the - - - the CPW



1 statutes fail intermediate scrutiny?

2 MS. MURDUKHAYEVA: They - - - they could've made  
3 that argument beca - - - under the same theory that the  
4 Bruen plaintiffs put forward about the underlying  
5 unconstitutional nature of the licensing scheme.

6 The - - - the second point I'd like to make about  
7 preservation is that it is not correct that there were no  
8 prudential changes that would've been made to the  
9 proceedings below if these claims had been raised. So for  
10 example, in - - - in this case, the trial happened in  
11 August 2019. The U.S. Supreme Court granted cert in NYSRPA  
12 v. City of New York in January 2019 - - - made clear it was  
13 going to revisit the question of what standard applies to  
14 Second Amendment challenges. And there was a right to  
15 travel claim in that case.

16 If Mr. Telfair had timely raised his challenges  
17 below, the prosecution could've done several things. The  
18 prosecution could've taken a look at that Supreme Court  
19 case and decided there was a real litigation risk on the  
20 constitutional issue and made a plea offer of a different  
21 disposition. Or it could have said, great, you're going to  
22 put your licensing status into question? I'm going to put  
23 in evidence of why you would not have qualified for a  
24 license otherwise, because you lacked good moral character,  
25 because you had other disqualifiers. All of Mr. Telfair's

1 Molineux arguments might essentially be mooted because all  
2 of that evidence would be relevant to whether he might have  
3 otherwise complied with New York's licensing requirements.  
4 And he may've just abandoned the constitutional challenge.

5 This is exactly the reason why preservation  
6 matters. By the time cases get to this court,  
7 constitutional arguments that may have been raised below,  
8 and were raised below, may have fallen away. If this court  
9 entertains constitutional arguments that are presented for  
10 the first time, you may be litigate - - - you may be  
11 deciding an issue that may just not ultimately be germane  
12 or relevant to the outcome of a case. Because the parties  
13 may have resolved the case otherwise.

14 And the third point I'd like to make on  
15 preservation is that the preservation issue is not limited  
16 to these six cases today. The preservation argument more -  
17 - - more broadly, with respect to constitutional claims  
18 based on intervening Supreme Court law, and even more  
19 narrowly with respect to Bruen, affects potentially  
20 thousands of cases. Our office has received over 900  
21 section 71 notices of constitutional challenges very  
22 similar to these challenges. I would note many of those,  
23 especially the more recent ones, are in preserved cases.  
24 So this court will have an opportunity to reach these  
25 questions in preserved challenges.



1           If this court decides to depart from its  
2           preservation jurisprudence, not only will you be reaching  
3           these cases in those preserved cases, but if you end up  
4           sending these cases back for new fact finding on many of  
5           these issues that were undeveloped, you will then also be  
6           re-li - - - re-litigating possibly tens of thousands of  
7           challenges that have already been concluded - - - the trial  
8           is concluded, people have taken pleas. And that would pose  
9           really remarkable burden on the - - - on the lower courts  
10          when they're already dealing with these issues in other  
11          cases.

12           JUDGE RIVERA: Guess the question is whether or  
13          not that flows because of Bruen or preservation.

14           MS. MURDUKHAYEVA: Well, Your Honor, it does not  
15          flow from Bruen. And I have many - - - I have many things  
16          to say about that. I'm cognizant of my - - - of the time,  
17          and I will be speaking in the next case. So I - - - I - -  
18          - I'm happy to address that question now or wait until the  
19          next case.

20           CHIEF JUDGE WILSON: Why don't you go ahead and  
21          address it now? Because I have a couple of questions also.

22           MS. MURDUKHAYEVA: Sure. The - - - the Bruen - -  
23          - the application of Bruen to this case is very different  
24          from the application of intervening Supreme Court case law  
25          in Patterson, for example. Bruen has no direct application

1 here. Bruen was not a criminal case. It was a section  
2 1983 challenge to a licensing requirement brought by people  
3 who already had licenses.

4 So really, the only question there was whether  
5 the proper cause requirement that barred these individuals  
6 from having unrestricted licenses was constitutional. That  
7 holding has no direct application here. As we've discussed  
8 ad nauseam, none of these defendants had licenses or even  
9 applied for licenses. Bruen especially has no bearing on  
10 the privileges and immunities claim. That did not come up  
11 in that case at all, and - - -

12 JUDGE RIVERA: What about the issue of the  
13 standard that Bruen adopts for determining whether or not a  
14 licensing scheme as a whole or any particular provision of  
15 a licensing scheme can survive a Second Amendment  
16 challenge?

17 MS. MURDUKHAYEVA: Your Honor, questions that go  
18 to the application of Bruen, standard to different types of  
19 - - - of Second Amendment challenges are exactly the type  
20 of claims that need to be preserved. What Bruen set  
21 forward is a very fact-intensive historical standard that  
22 requires factual development. Justice Thomas said, in - -  
23 -

24 JUDGE RIVERA: The facts are not specific to the  
25 defendant, right? That - - - that's the point of the

1 historical fact.

2 MS. MURDUKHAYEVA: They - - - they may be  
3 actually, Your Honor. Because there are two separate  
4 inquiries that are required by Bruen. The first inquiry is  
5 whether the defendant's conduct is protected by the Second  
6 Amendment at all. And that is a - - - a question that  
7 itself depends on the text and the history of the Second  
8 Amendment. And then, once that has been established by the  
9 parties seeking to assert the Second Amendment right, the  
10 burden shifts to the government to defend any restriction  
11 on a presumptively protected right with historical  
12 evidence.

13 So depending on the nature of the defendant's  
14 conduct, the Second Amendment may or - - - or may not  
15 apply. You may - - -

16 JUDGE RIVERA: Prior felon, let's just choose  
17 that one. Prior felon.

18 MS. MURDUKHAYEVA: I'm sorry?

19 JUDGE RIVERA: Prior felon, let's just choose  
20 that one.

21 MS. MURDUKHAYEVA: Sure. I think one question  
22 would be, what - - -

23 JUDGE RIVERA: What's - - - what would be  
24 specific about that defendant? If everyone could see this  
25 is a prior felony conviction?

1 MS. MURDUKHAYEVA: Well, there would be a couple  
2 of questions that are specific. One would be - - - is if,  
3 in the context of the Range case - - -

4 JUDGE RIVERA: Okay.

5 MS. MURDUKHAYEVA: - - - that - - - that issue  
6 arose in the Range case. That was an instance where a  
7 person brought a preemptive lawsuit against the Department  
8 of Justice to challenge that disqualifier and said, I want  
9 to exercise my constitutional right, and I cannot do so  
10 because of this disqualifier.

11 JUDGE RIVERA: Um-hum.

12 MS. MURDUKHAYEVA: The first-level inquiry on the  
13 scope of the Second Amendment right there is different from  
14 someone who does not have a license, merely possesses a gun  
15 without a license, and then comes forward and says, I have  
16 a Second Amendment right.

17 You would also have to establish whether there is  
18 a Second Amendment right to unlicensed carry in all  
19 circumstances, in some circumstances, in limited  
20 circumstances. These are all questions that require  
21 development. And the development - - -

22 JUDGE RIVERA: But what - - - what facts would be  
23 specific to a particular defendant? Perhaps I'm  
24 misunderstanding your argument.

25 MS. MURDUKHAYEVA: Well, I think - - -

1 JUDGE RIVERA: If - - - if what the Supreme Court  
2 has said is, we look to the history of that particular type  
3 of regulatory provision or that particular type of  
4 regulation, how is - - - how is it specific to the  
5 defendant's facts, that are - - - that are unique to that  
6 defendant?

7 MS. MURDUKHAYEVA: Again, at step one of the  
8 inquiry, the court looks to whether the defendant's conduct  
9 is protected by the Second Amendment. And to evaluate that  
10 question, you would need to look at what the conduct is.  
11 Maybe that question overlaps for some people. Maybe for  
12 many people the reason they carry a gun without a license  
13 is going to be the same. But it is not necessarily  
14 determinative.

15 More - - - more specifically, I will say I have  
16 litigated many post-Bruen challenges to New York's gun  
17 laws. The historical record inquiry is not superficial.  
18 This involves - - -

19 JUDGE HALLIGAN: Is that being made in these  
20 cases, Counsel? The - - - if - - - if you can tell us from  
21 your - - - your experience you're referring to?

22 MS. MURDUKHAYEVA: I'm - - -

23 JUDGE HALLIGAN: Is - - - is - - -

24 MS. MURDUKHAYEVA: If you could just clarify the  
25 question?

1 JUDGE HALLIGAN: - - - the record in these cases  
2 that you're referring to being made with regard to what the  
3 historical evidence is?

4 MS. MURDUKHAYEVA: Of - - - of that I am not  
5 sure. I think a lot of these challenges are kind of in  
6 their incipient form. And many of them are waiting, think,  
7 for decisions from federal courts evaluating the  
8 constitutionality of New York's other licensing provisions.  
9 But for something like the felon in possession limitation,  
10 the amount of historical evidence that is necessary to  
11 adjudicate that question is voluminous. We're ta - - -  
12 we're talking about literally hundreds of exhibits. Our  
13 state, many other states, have hired experts to opine on  
14 the historical evidence for these issues and other Bruen-  
15 related issues.

16 Thi - - - this is just not the kind of question  
17 that should be addressed lightly. The - - - the reason we  
18 have preservation requirements is so that lower courts have  
19 an opportunity to make these records, but also that the  
20 parties have an opportunity to make strategic litigation  
21 decisions about how to proceed in particular cases in light  
22 of constitutional litigation risk.

23 Thank you.

24 CHIEF JUDGE WILSON: I did have - - -

25 MS. MURDUKHAYEVA: Oh, yes?



1 CHIEF JUDGE WILSON: - - - one question for you.  
2 Are you aware of any prosecutions under 400.00(15)?

3 MS. MURDUKHAYEVA: I am not, Your Honor. And one  
4 reason for that may be that historically New York has dealt  
5 with licensing violations through the administrative  
6 scheme. New York licensing officers generally retain the  
7 right to revoke or modify terms of licenses based on  
8 intervening facts. So in cases - - - I am aware of cases  
9 where a licensing officer became aware of some misconduct  
10 or some violation - - -

11 CHIEF JUDGE WILSON: Okay.

12 MS. MURDUKHAYEVA: - - - of the terms of the  
13 license and would just rescind the license, rather than - -  
14 -

15 CHIEF JUDGE WILSON: But not a misdemeanor  
16 prosecution?

17 MS. MURDUKHAYEVA: - - - prosecution. Correct.  
18 I - - - I am not aware of any.

19 CHIEF JUDGE WILSON: Thank you.

20 MS. MURDUKHAYEVA: Thank you, Your Honor.

21 MR. KRINSKY: I know you've been here for a long  
22 time, so I'm going to be very brief in rebuttal. I'll rely  
23 upon the previous arguments. I'll rely upon the cases  
24 previously cited, Patterson, Baker, the whole line of cases  
25 - - - Stobb, and all the - - - and Shuttlesworth. And I



1 just want to point out, so there's no factual  
2 misunderstanding, Mr. Telfair did not have a prior felony  
3 conviction. I don't know if that came up in the course of  
4 argument.

5 I'll rely upon my previous arguments. Thank you,  
6 Your Honor.

7 CHIEF JUDGE WILSON: Thank you, Counsel.

8 (Court is adjourned)

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

I, Terry Hodges, certify that the foregoing transcript of proceedings in the Court of Appeals of People of the State of New York v. Sebastian Telfair, No. 62, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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